LUGGAGE DISTRIBUTORS (M) SDN BHD

v.

TAN HOR TENG @ TAN TIEN CHI & ANOR.

COURT OF APPEAL KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' V.C. GEORGE JCA
DATO' ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NO. W-02-38 OF 1994]
6 MARCH 1995

(**Editorial Note:** This case has been previously reported in [1995] 2 CLJ 713 with the sole judgment of Tuan Gopal Sri Ram JCA. For purposes of completeness, this case is again reported to incorporate as well the judgments of Dato' V.C. George and Dato' Abu Mansor bin Ali JJCA).

INTERPRETATION: *Contracts - Intention of parties - Recitals in contracts - Whether an aid to construction - National Land Code ss. 213(3) & 323(1) - Construction - Principle of generalibus specialia derogant - Whether applicable.*

LAND LAW: *Exempted tenancy - Interest therein - Whether protectable by entry of caveats - Whether there was caveatable interest - National Land Code ss. 213(3), 323(1).*

LAND LAW: *Two year tenancy with option to renew for another two years - Option exercised by tenant - Whether a registrable lease - Whether an exempted tenancy - National Land Code s. 224(b).*

PRACTICE & PROCEDURE*: New points raised in appeal - Whether allowable - Principles applicable - Consideration of interest of justice - Whether paramount.*

The appellant is the registered proprietor of a piece of land together with a shop house situated thereon (the premises). On 8 July 1993 the appellant entered into a tenancy agreement with the respondent and rented out the ground floor of the premises for a period of two years. The first recital of the agreement stipulated however that the whole premises was rented out, whereas the second recital read "The premises shall be rented to the tenants for 2 years commencing, August 93 (rent free) to 31 August 95, plus a further 2 years option".

On 24 November 1993, the appellant entered into a sale and purchase agreement (sale agreement) with one Quill and sold the premises without vacant possession. On 22 November 1993 one Low, on behalf of Quill, entered a caveat against the land, in order to preserve the *status quo* pending completion of the said sale to Quill. On 12 January 1994, the respondents entered a caveat against the register document of title to the land on the grounds that they had an option to renew the tenancy for another two years and that they had exercised that option. The appellant, unable to complete the sale to Quill because of the respondents' caveat, applied to remove the same but the application was dismissed by the High Court. The appellant appealed and argued before this Court, *inter alia*, that the respondents' caveat could no longer stay as there was undue delay on the part of the respondents, after having entered the caveat, to commence proceedings to enforce the alleged interest. This however was a new point raised only in this appeal.

Held:

Per Gopal Sri Ram JCA (V.C. George, Abu Mansor Ali JJCA concurring):

[1] The categories of cases in which an appellate Court will admit a new point are not closed. The governing principle is this: an appellate Court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of the case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[2] If Counsel who had conduct of the case in the Court below had raised the failure of the respondents to timeously take out civil proceedings to enforce the claim, Counsel for the respondents may, if necessary by seeking an adjournment, put in additional evidence on affidavit to show why such proceedings had not been commenced. It would have been up to the Judge to determine whether the explanation proffered was good and, even if it was not, whether the respondents ought to be given an extension of time to commence proceedings. The failure of the appellants to raise the delay point at first instance has therefore deprived the respondents of an opportunity to offer an evidentiary rebuttal to it. Stated in this way, the matter then becomes a question of natural justice. To permit the appellant to raise the point at the appellate stage would amount to a deprivation of essential justice from the respondents.

[3] It is a cardinal rule in the interpretation of contracts that recitals may be taken into account as an aid to construction and this is all the more so where there is ambiguity in the document. Further, in an appropriate case the Court may construe a recital as carrying with it an obligation to carry into effect that which is recited.

[4] Applying the principles of construction, although there is no mention of an option anywhere else in the tenancy agreement save in the recital, objectively tested, it was the intention of the parties that the respondents shall have an option to renew the tenancy for a further two year period. The recital, in the circumstances of the present case, creates a right in the respondents to such an option and in the appellants, and all those who take the land subject to the tenancy, a corresponding obligation to honour that option.

[5] It is plain that what the respondents had was tenancy for a period of two years with an option to obtain a further tenancy for a further two years. Since the recital is silent as to the time frame within which it is to be exercised, it may be exercised by giving notice within a reasonable time before the expiry of the first term of two years. As such the option had been properly exercised within a reasonable time and therefore the respondents are entitled to a second term of two years on the same terms as those contained in the tenancy agreement except for the option contained in its second recital.

[6] This is not a case where it is alleged as a matter of evidence that the parties *ab initio* orally agreed to create a lease. The respondents' case rests entirely on the construction to be placed on the tenancy agreement. Here, s. 224(b) of the Code is against the respondents. That section, upon a plain reading of it, expressly prohibits any option for renewal from being taken into account when determining the length of a tenancy for a fixed period. What in reality the respondent got was a tenancy for a fixed period of two years with an option for further two years. The Code in s. 224 (b) directs that no regard is to be had to the period under the option. Therefore the respondents were occupying the premises as exempted tenants. They are not, and never were, lessees.

[7] A claimant to any title or registrable interest in land may frame his case in one of two actions. If the facts pertaining to his claim enable him to bring his case within those vitiating categories specified under s. 340(2) of the Code, then he may frame his case under one or more of those categories as an action *in rem*. If on the other hand, he is unable to bring himself squarely within the exceptions in favour of defeasibility, then, all is not lost for him, for, if he is able to constitute his complaints as an action *in personam* he may achieve the same result. Of course, as an action *in personam*, his claim may be subjected to all those discretionary considerations that operate in the grant or refusal of specific relief. In either case, he may be entitled to secure the *status quo* by the entry of a private caveat.

[8] In the present case, s. 323(1) of the Code is a general provision while s. 213(3) is a special provision that exclusively deals with the mode afforded for the protection of exempted tenancies and with the consequences of endorsement. Section 267(1) of the Code demonstrates the nature and extent of the protection that endorsement confers upon an exempted tenancy. That section, *inter alia*, provides that a purchaser of land at a public auction consequent upon foreclosure proceedings shall take his title subject to an endorsed exempted tenancy. Accordingly, the only remedy available under the Code to an exempted tenant is the endorsement of his exempted tenancy upon the register document of title. He cannot secure his position by the entry of a private caveat.

Per V.C. George JCA:

[1] In the context of the present case the test prescribed by s. 224 of NLC is to be applied by pitting that section against the tenancy agreement, in particular clause 2 thereof. What came out of such application is only a "term for a fixed period" of two years as "no account shall be taken of the fact that it is capable of renewal" for another fixed term of two years. There is thus no merit in the respondent's contention that the tenancy, by reason of the extra two years stated in the option, has metamorphosed into a four year lease.

[2] There is also no merit in the contention that the option clause was bad for uncertainty by reason of the words "plus a further two years option" therein. What was meant by the phrase was that the old lease would be renewed for another two years upon the same terms and conditions, but not that, after such renewal, it could be renewed in perpetuity. There is sufficient authority to support the view that an express provision that all covenants in the original lease shall be inserted in the renewed lease will not include a covenant for a further renewal.

[Appeal allowed]

[**Bahasa Malaysia** Translation of Headnotes]

INTERPRETASI: *Kontrak - Maksud pihak yang berkontrak - Resital dalam kontrak - Samada boleh menolong pentafsiran - Kanun Tanah Negara ss. 213(3) & 323(1) - Pentafsiran - Prinsip generalibus specilia derogant - Samada terpakai.*

UNDANG-UNDANG TANAH: *Tenansi terkecuali - Kepentingan di dalamnya - Samada dilindungi oleh kemasukan kaveat - Samada wujud kepentingan yang boleh dikaveat - Kanun Tanah Negara ss. 213(3) & 323(1).*

UNDANG-UNDANG TANAH: *Tenansi dua tahun dengan opsyen untuk dua tahun - Opsyen dilaksanakan oleh penyewa - Samada tenansi menjadi pajakan yang boleh didaftar - Samada hanya tenansi terkecuali - Kanun Tanah Negara s. 224(b).*

AMALAN & PROSIDUR: *Persoalan baru dibangkitkan dalam rayuan - Samada dibenarkan - Prinsip yang terpakai - Pertimbangan kepentingan keadilan - Samada sangat penting.*

Perayu adalah pemilik berdaftar kepada sebidang tanah bersekali dengan sebuah rumah kedai di atasnya (premis tersebut). Pada 8 Julai 1993 perayu memeterai satu perjanjian penyewaan dengan responden dan menyewa lantai bawah premis tersebut untuk dua tahun. Resital pertama perjanjian tersebut, bagaimanapun, menyatakan bahawa keseluruhan premis tersebut telah disewakan, manakala resital kedua pula menyebut "Premis ini akan disewa kepada penyewa untuk dua tahun bermula Ogos 93 (tanpa bayaran sewa) sehingga 31 Ogos 95, dengan opsyen dua tahun lagi".

Pada 24 November 1993, perayu memeterai perjanjian jual beli (perjanjian penjualan) dengan satu Quill dan menjual premis tersebut tanpa pemilikan kosong. Pada 22 November 1993, seorang Low telah memasukkan kaveat terhadap tanah berkenaan bagi pihak Quill, bertujuan untuk mengekalkan *status quo* sementara menunggu penjualan kepada Quill disempurnakan. Pada 12 January 1994, responden memasukkan kaveat terhadap dokumen daftar hakmilik tanah tersebut atas alasan bahawa mereka mempunyai opsyen untuk menyambung penyewaan premis tersebut selama dua tahun lagi, dan telah mempergunakan opsyen tersebut. Perayu, yang gagal menyempurnakan penjualan kepada Quill disebabkan kaveat responden, memohon untuk membatalkan kaveat tersebut, tetapi permohonan itu ditolak oleh Mahkamah Tinggi. Perayu merayu dan berhujah dihadapan Mahkamah Rayuan, antara lain, bahawa kaveat responden tersebut tidak boleh disambung lagi, oleh kerana, berlaku kelambatan yang tidak wajar di pihak responden, setelah kaveat tersebut didaftarkan, untuk memulakan prosiding bagi menguatkuasakan kepentingan yang dituntutnya itu. Ini bagaimanapun adalah satu persoalan baru yang hanya dibangkitkan dalam rayuan ini.

Diputuskan:

Oleh Gopal Sri Ram HMR (V.C. George, Abu Mansor Ali HHMR bersependapat):

[1] Kategori kes-kes di mana sesebuah Mahkamah rayuan menerima masuk persoalan baru tidak ditutup. Prinsip yang terpakai adalah: sesebuah Mahkamah rayuan akan menerima masuk persoalan baru yang dibangkitkan buat pertama kali dihadapannya jika ianya perlu demi kepentingan keadilan. Soal samada keperluan kepentingan keadilan itu dipenuhi atau tidak bergantung kepada fakta sesuatu kes. Faktor-faktor yang menyokong dan membantah kemasukan sesuatu persoalan baru itu mestilah ditimbang atas satu neraca untuk melihat di mana terletaknya keadilan sesuatu kes itu.

[2] Jika Peguam yang mengendalikan kes dalam Mahkamah di bawah membangkitkan di Mahkamah itu kegagalan responden untuk memulakan dengan cepat prosiding untuk menguatkuasakan tuntutannya, Peguam responden mungkin boleh, dengan memohon penundaan jika perlu, mengemukakan keterangan tambahan melalui afidavit untuk menunjukkan kenapa prosiding sedemikian tidak dibuat. Ianya akan bergantung kepada Hakim untuk menentukan samada penerangan yang diberikan itu memuaskan, dan jikapun tidak, samada responden patut diberi lanjutan masa untuk memulakan prosiding. Kegagalan perayu membangkitkan persoalan kelambatan ini diperingkat awal, dengan itu, telah menahan responden dari peluang untuk mengemukakan keterangan bantahan terhadap persoalan yang dibangkitkan itu. Dinyatakan cara ini, perkara tersebut menjadi satu persoalan keadilan asasi. Untuk membenarkan perayu membangkitkan persoalan berkenaan diperingkat rayuan di sini bermakna merampas keadilan asasi dari responden.

[3] Ianya adalah peraturan penting dalam pentafsiran kontrak bahawa resital sesuatu kontrak boleh dipertimbangkan untuk membantu pentafsiran, lebih-lebih lagi apabila wujud kekaburan dalam dokumen berkaitan. Selanjutnya, dalam kes yang sesuai, Mahkamah boleh mentafsir sesuatu resital itu sebagai mengandungi obligasi untuk melaksanakan apa yang disebut didalamnya.

[4] Memakai prinsip pentafsiran ini, walaupun perkara pilihan atau opsyen tidak disebut di mana-mana pun di dalam perjanjian penyewaan di sini melainkan di dalam resital, diuji secara objektif, ianya adalah maksud pihak-pihak yang berkontrak bahawa responden berhak kepada opsyen untuk selama dua tahun lagi. Resital tersebut, dalam halkeadaan kes ini, memberikan responden hak kepada opsyen berkenaan, dan meletakkan obligasi ke atas perayu, dan sesiapa jua yang mengambil tanah tersebut tertakluk kepada tenansi yang wujud itu, untuk menghormatinya.

[5] Adalah jelas disini bahawa apa yang dimiliki responden ialah satu tenansi untuk dua tahun dengan opsyen untuk dua tahun lagi. Oleh kerana resital berkenaan tidak menyebut apa-apa pun tentang jangkamasa di dalam mana opsyen tersebut perlu dipergunakan, maka ianya bolehlah dipergunakan dengan memberi notis dalam waktu yang munasabah sebelum tenansi dua tahun pertama itu berakhir. Opsyen berkenaan telah dipergunakan oleh responden dalam masa yang munasabah, dan oleh itu, responden adalah berhak kepada sambungan tenansi bagi jangkamasa dan atas terma-terma yang sama seperti tenansi yang terdahulu, kecuali opsyen yang terkandung dalam resital kedua.

[6] Ini bukanlah satu kes di mana terdapat hujah, sebagai satu perkara keterangan, bahawa pihak-pihak yang berkontrak *ab initio* bersetuju secara lisan untuk mewujudkan satu pajakan. Kes responden bergantung sepenuhnya kepada pentafsiran yang boleh dibuat terhadap perjanjian penyewaan. Di sini, s. 224(b) Kanun adalah tidak berpihak kepada responden. Seksyen ini, di atas bacaannya yang jelas, terang-terang melarang sesuatu opsyen itu diambil kira bagi menentukan jangkamasa tetap sesuatu tenansi. Apa yang diperolehi responden adalah tenansi untuk dua tahun bersama opsyen untuk dua tahun lagi. Berdasarkan s. 224(b) Kanun, jangkamasa dua tahun di bawah opsyen itu tidak boleh diambil kira. Oleh itu responden telah menduduki premis tersebut sebagai penyewa terkecuali. Mereka bukannya, dan tidak pernah menjadi, pemajak.

[7] Seseorang yang menuntut sesuatu hakmilik atau sesuatu kepentingan kepada tanah yang boleh didaftar, boleh menggayakan tuntutannya melalui satu daripada dua cara. Sekiranya fakta bersabit tuntutannya itu membolehkannya meletakkan kesnya kedalam lingkungan kategori pengecualian yang diperincikan di bawah s. 340(2), maka dia bolehlah merangka kesnya di bawah salah satu dari pengecualian tersebut sebagai satu tindakan *in rem*. Dipihak yang lain, sekiranya dia tidak boleh membawakan kesnya ke dalam lengkongan pengecualian-pengecualian itu, jalan masih terbuka baginya untuk mencapai keputusan yang sama, iaitu jika dia boleh mewajarkan tuntutannya itu sebagai satu tindakan *in personem.* Tentulah, sebagai satu tindakan *in personem*, tuntutannya adalah tertakluk kepada segala budibicara yang biasa terpakai apabila sesuatu relif spesifik diberi atau ditolak. Dalam kedua-dua kes, dia berhak untuk mengekalkan *status quo* dengan memasukkan kaveat persendirian.

[8] Dalam kes semasa, s. 323(1) Kanun adalah satu peruntukan am, manakala s. 213(3) adalah peruntukan khas yang menyentuh secara ekslusif tentang jenis perlindungan yang diberi kepada tenansi terkecuali serta tentang akibat-akibat endorsmen. Seksyen 267(1) Kanun pula memperlihatkan bentuk dan takat perlindungan yang diberikan oleh sesuatu endorsmen kepada tenansi terkecuali. Seksyen ini, antara lain, memperuntukkan bahawa hakmilik yang diperolehi seorang pembeli tanah dilelongan awam berikutan prosiding sekat-tebusan, adalah tertakluk kepada tenansi terkecuali yang telah diendors. Oleh yang demikian remedi yang terbuka bagi seseorang penyewa terkecuali di bawah Kanun adalah bergantung sepenuhnya kepada pengendorsan tenansi terkecuali tersebut di dalam dokumen daftar hakmilik. Kedudukannya tidak boleh dilindungi dengan memasukkan satu kaveat persendirian.

Oleh V.C. George HMR:

[1] Dalam konteks kes semasa ini ujian seperti yang termaktub dalam s. 224 Kanun Tanah Negara harus dipakai dengan menghadapkan seksyen tersebut kepada perjanjian tenansi, terutama kepada fasal 2 di dalamnya. Dari pemakaian sedemikian apa yang terbit hanyalah satu "terma untuk jangka tetap" selama dua tahun oleh kerana "perkiraan tidak boleh diambil bahawa ianya boleh diperbaharui" untuk selama dua tahun lagi. Oleh hal yang demikian tidak terdapat merit dalam hujah responden bahawa tenansi berkenaan, disebabkan oleh tambahan masa dua tahun yang disebut di dalam opsyen itu, telah bertukar dan menjadi satu pajakan empat tahun.

[2] Juga tidak terdapat apa-apa merit dalam hujah bahawa fasal opsyen tersebut tidak sah atas sebab kekaburan yang berbangkit dari perkataan "dicampur dengan opsyen selama dua tahun lagi" di dalamnya itu. Apa yang dimaksudkan dengan phrasa tersebut ialah pajakan yang lama itu boleh diperbaharui untuk selama dua tahun lagi di atas terma dan syarat yang sama, tetapi tidak bermaksud bahawa, selepas perbaharuan itu, ianya boleh diperbaharui lagi sampai bila-bila. Terdapat autoriti yang mencukupi untuk menyokong pandangan bahawa peruntukan nyata yang membenarkan terma-terma di dalam pajakan lama diserapkan kedalam pajakan yang diperbaharui tidak merangkumi pajakan yang diperbaharui lagi selanjutnya.

[*Rayuan dibenarkan]*

Cases referred to:

Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44 ***(foll)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Tan Suan Heoh v. Lim Teck Ming [1987] 2 MLJ 446 ***(refd)***
Jit Kaur v. Parl Singh [1974] 2 MLJ 199 ***(foll)***
Hew Sook Ying v. Hiw Tin Hee [1992] 2 MLJ 189 ***(refd)***
Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman Civil Appeal No. A-02-2-94 ***(refd)***
Muniandy v. Muhammad Abdul Kader [1989] 2 MLJ 416 ***(refd)***
Lee An Chor v. Southern Bank Bhd. [1991] 1 MLJ 428 ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd. [1967] 2 MLJ 9 ***(refd)***
Mosbert Berhad v. Stella D'Cruz [1985] 2 MLJ 446 ***(refd)***
Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd. [1992] 1 MLJ 263 ***(refd)***
Wong Kuan Tan v. Gambut Development Sdn. Bhd. [1984] 2 MLJ 113 ***(refd)***
Tan Heng Poh v. Tan Boon Thong [1992] 2 MLJ 1 ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn. Bhd. [1994] 3 AMR 2125 ***(refd)***
Million Group Sdn. Bhd. v. Lee Shoo Khoon [1986] 1 MLJ 315 ***(refd)***
Jayaraman v. Kwong Yik Bank Berhad [1994] 2 CLJ 695 ***(refd)***
Walsh v. Lonsdale [1882] 21 Ch. D. 9 ***(refd)***
Siew Soon Wah v. Yong Tong Hong [1973] 1 MLJ 133 ***(refd)***
Woo Kok Wan v. Loo Pek Chee [1975] 1 MLJ 156 ***(refd)***
Orr v. Mitchell [1893] AC 238 ***(refd)***
Aspdin v. Austin [1844] 1 QB 671 ***(refd)***
Sampson v. Easterby [1830] 9 B & C 505 ***(refd)***
King's Motors (Oxford) Ltd. v. Lax [1969] 3 All ER 665 ***(not foll)***
Zainal Abidin v. Century Hotel Sdn. Bhd. [1987] 1 MLJ 236 ***(refd)***
Smith v. Morgan [1971] 2 All ER 665 ***(cit)***
Rothwell v. Wakeling [1975] 29 p. & CR 234 ***(cit)***
Trustees of National deposit Friendly Society v. Beatties of London Ltd. [1985] 2 EGLR 59 ***(cit)***
Corson v. Rhuddlan Borough Council [1990] 1 EGLR 255 ***(foll)***
Hillas & Co. v. Arcos [1923] 147 LT 503 ***(cit)***
Foley v. Classique Coaches [1934] 2 KB 1 ***(cit)***

Lewis v. Stephenson [1898] 67 LJQB 296 ***(foll)***
Liverpool City Council v. Irwin [1977] AC 239 ***(cit)***
Tai Hing Cotton Mills v. Liu Chong Hing Bank [1986] AC 80 ***(cit)***
The Netherlands Insurance Co. v. Karl Ljungberg & Co. [1986] 2 MLJ 32 ***(cit)***
Lim Soo Seng v. Majlis Perbandaran Pulau Pinang [1990] 1 MLJ 22 ***(refd)***
Law Land Company Ltd. v. Consumers' Association Ltd. [1980] 255 EGLR 617 ***(refd)***
Antaios Cia. Naviera S.A. v. Salen Rederiema A.B. [1985] AC 191 ***(refd)***
Kuwait Minister of Public Works v. Snow & Partners [1984] 1 All ER 733 ***(dist)***
Nagpal Printing Mills v. Municipal Corporation of Greater Bombay [1987] 1 MCC 411 ***(dist)***
Gerraty v. McGavin [1914] 18 CLR 152 ***(foll)***
Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(foll)***
Mercantile Bank Ltd v. Official Assignee [1969] 2 MLJ 196 ***(refd)***
Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Othman & Anor. v. Mek [1972] 2 MLJ 158 ***(refd)***
Oh Hiam & Ors. v. Tham Kong [1980] 2 MLJ 159 ***(refd)***
Bachan Singh v. Mahinder Kaur & Ors [1956] MLJ 97 ***(refd)***
Commissioner of Income Tax v. Shahzada Nand & Sons AIR 1966 SC 1342 ***(foll)***
PP v. Chew Siew Luan [1982] 2 MLJ 119 ***(refd)***
Chiu Wing Wa v. Ong Beng Cheng [1994] 1 CLJ 313 ***(refd)***
Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 86 ***(refd)***
Amalgamated Investment & Property Co. Ltd v. Texas Commerce International Bank Ltd. [1984] QB 84 ***(refd)***
Lim Teng Huan v. Ang Swee Chuan [1992] 1 SCR 249 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 206(3) 213(3), 221(2), 224(b), 323(1)(a), 323(1), 326, 327, 327(1), 340(1), 340(2), 417(2)(1)
Rules of the Court of Appeal, 1994, rr. 18(2), 21(1)
Specific Relief Act 1950, s. 26(b)

For the appellant - T. Thomas (Phang Chi Ming with him); M/s. Lee Ong & Kandiah
For the respondent - C.V. Das (K. Mohan with him); M/s. Shook Lin & Bok

JUDGMENT

Gopal Sri Ram JCA:

Introduction

This is an appeal from the decision of Chan J (now JCA) given on 12 July 1994, whereby he dismissed an application by the appellant to remove a caveat lodged by the respondents against the appellant's title to certain property. We heard this appeal on 14 & 15 February 1995 and reserved our decision to 16 February, when we unanimously allowed it and made certain consequential orders. We indicated to Counsel that reasons will be given and these are now produced.

Now, when I first read the record of appeal, I formed the view that this was a tolerably plain case. I must say that at the conclusion of two days of argument, accompanied by the copious citation of authorites, and after the dust of vigorous conflict had settled, my initial view remained unchanged. The appeal remained what it had always been: a tolerably plain case. Accordingly, I was first minded to deal shortly with the one point of any importance in this appeal. But I decided against such a course for that would have meant disregarding, almost entirely the efforts of Counsel who appeared before us: and that to my mind did not seem fair. I have therefore chosen a more arduous route to arrive at the same conclusion at which I would have arrived, had I kept to the course that first presented itself to me.

The facts

There are four parties concerned in this case. They are the appellant, the respondents, the purchaser, Quill Construction Sdn. Bhd. (whom I will refer to throughout this judgment as "Quill") and a Madam Low Moi Ing (whom I shall refer to as "Low"). Of these only two are involved in the present litigation: Quill and Low are not.

The appellant is the registered proprietor of all that land held under Geran No. 890 for lot No. 22592 in the District of Kuala Lumpur ("the land"). There is a building on the land. It is a shop-house with the address No. 12 Jalan Telawi Dua, Bangsar Baru ("the premises"). Common knowledge has it that that locality is one of the more popular commercial-cum-residential areas in the City.

The respondents are Malaysians. They have a business in Singapore styled "Tomlinson Antique House." They wanted to ply their trade at Kuala Lumpur and needed premises for that purpose. So, on 8 July 1993, they entered into a tenancy agreement ("the tenancy agreement") with the appellant to rent the whole of the ground floor of the premises for a period of two years. It is a very poorly drafted document. Counsel suggested that it was probably drafted by an estate agent. I have little doubt that it was. Let me add that there is grave danger in entrusting the drafting of tenancy agreements to nonprofessionals and this case is a good example of it.

As I said a moment ago, the appellant let only the ground floor of the premises to the respondents. There were several other tenants occupying other floors of the premises. But the first recital of the tenancy agreement says something different. This is how it reads:

> 1. The tenants shall take and the landlords shall let all that premises known as 12 Jalan Telawi Dua, Bangsar Baru, 59100 Kuala Lumpur (hereinafter called `the premises') together with the fixtures, fittings and interior decoration items now in the premises (specified in the fixtures and fittings schedule) for the term at the rent and upon the terms hereinafter mentioned.

The second recital, which has been the source of so much trouble in this case and around which this case has really gravitated, reads as follows:

> 2. The premises shall be rented to the tenants for 2 years commencing 1 August 93 (rent free) to 31 August 95, **plus a further 2 years option**." (emphasis supplied.)

Encik T. Thomas who appeared for the appellant before us, but not in the Court below, pointed out that that is the only place in the whole of that unfortunate document where there is any mention of an option to renew. Yet, as events turned out, those few words upon which I have laid emphasis were to engage our attention for the better part of two days.

The tenancy thus created in the respondents' favour was capable of protection by endorsement on the register document of title under the relevant provisions of the National Land Code, 1965 (which I shall throughout this judgment refer to as "the Code"). No such endorsement was, however, made. Reference to the relevant provisions of the Code and to their effect will be made later in this judgment.

On 24 November 1993, some three months after the tenancy agreement was entered into, the appellant, unbeknownst to the respondents entered into a sale and purchase agreement ("the sale agreement") with Quill. The sale agreement gives Quill's address as No. 10-01, Jalan Telawi Dua, Bangsar Baru, which is the building adjacent to the premises. Our attention was drawn to the recitals and clauses in the sale agreement. I think that they merit reproduction here. The relevant recitals are as follows:

a

A. The vendor is the registered owner of all that piece of property known as No. 12, Jalan Telawi Dua, Bangsar Baru, 59100 Kuala Lumpur and held under title geran no. pendaftaran 890, No. lot 22592, Mukim of Kuala Lumpur, District of Kuala Lumpur, State of Wilayah Persekutuan and measuring approximately 2,040 square feet in area (hereinafter referred to as the "said property").

B. The vendor has agreed to sell and the purchaser has agreed to purchase the said property at the purchase price of Ringgit Malaysian One Million and Seven Hundred Thousand (RM1,700,000) only.

C. The purchaser is applying for a bank loan to assist the purchaser to pay part of the purchase price of the said property.

D. The said property is tenanted to various tenants under their respective tenancy agreement and particulars whereof have been rendered to the purchaser.

It is clear from these recitals that the property was being sold without vacant possession and that financing for its purchase was contemplated. The importance of the former rests on the proposition that Quill's conscience was bound by the tenancy agreement, whilst the latter demonstrates that an innocent third party, namely, a financier would in all probability seek a charge of the title to the land as security for the intended loan. The existence of any caveat would, of course, frustrate all financing arrangements. These comments are made *en passant* before turning to the relevant clauses in the agreement which are as follows:

1. In consideration of the sum of Ringgit Malaysian One Hundred and Seventy Thousand (RM170,000) only payable by the purchaser to the vendor (receipt of which the vendor hereby acknowledges) by way of a forfeitable deposit (hereinafter referred to as "the deposit") and earnest money and part payment towards the purchase price of Ringgit Malaysian One Million and Seven Hundred Thousand (RM1,700,000) only (hereinafter referred to as "the purchase price") the vendor agrees to sell and the purchaser agrees to buy the said property free of all encumbrances but subject to all conditions of title whether express or implied, all unregistered easements (if any) affecting the same and the existing category of land use affecting the said property and **subject to the respective tenancy referred to in Recital E hereof.**

4. **Legal possession** of the said property shall be delivered by the vendor to the purchaser upon the release to the vendor of the balance of the purchase price but subject to the cl. 11 and upon confirmation that all charges incurred or payable by the vendor including quit rent, assessment, water and electricity charges have been duly settled by the vendor.

7. **The said property shall be deemed to have been inspected by the purchaser** and the purchaser shall purchase and accept the same in the condition and state in which it is at the completion date or such earlier or later completion date as may be agreed to by the vendor and the purchaser shall not be entitled to rescind this Agreement or to make any claim for compensation or reduction of any misdescription of the area, condition or state of the said property. (The emphasis is mine.)

I have underscored the relevant parts of each of the foregoing clauses to add emphasis to the fact that Quill was not getting vacant possession and that the benefit and the burden of the respondents' tenancy was to be passed on to Quill by the appellant.

Encik Thomas drew our attention to the phrase "legal possession" in cl. 4 and stressed that it was not vacant possession. With respect, I think that goes without saying. The sale agreement must, like all other instruments, be read as a whole and it does not take much to be impressed that the conclusions I have already adverted to are only fair and reasonable ones to be drawn from such a reading.

To return to the narrative, two days prior to the date of the sale agreement Low entered a caveat. Presumably, this caveat was entered on Quill's behalf in order to preserve the *status quo* pending completion of the sale to Quill. I say that because the papers relating to this caveat which is dated 22 November 1993, were, for some unknown reason, not produced as exhibits, although, we gathered during argument that Low is really the alter ego of Quill.

On 15 December 1993, solicitors for the respondents wrote to Low. Counsel for the respondents in the course of his submissions before us said that although addressed to Low, this was in reality a letter to Quill. It is an important letter and I therefore produce it below. Any errors that appear in it are not of my making.

K.Y. Thong & Co
Advocates & Solicitors
Madam Low Moi Ing
No. 10-01, Jalan Telawi Dua
Bangsar Baru
59100 Kuala Lumpur

15 December 1993 **By Hand**

Dear Madam,

Re: **Ground Floor of No. 12, Jalan Telawi Dua, Bangsar Baru, 59100 Kuala Lumpur ("the Premises")**

We act for Tomlinson Antique House, who occupies the Premises as the tenant of Luggage Distributors (M) Sdn. Bhd. ("the Landlord").

2. We have conducted a search on the Title to the building ("the Building") of which the Premises from part, ie. Geran 890, No. Lot 22592, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan. The search reveals a Private Caveat lodged by you on 22 November 1993 under Presentation No. 13034/93 Jilid No. 246, Folio No. 188. We were not able at that search to examine the instrument and thus to establish the reason for lodgement. Please therefore **forward to us a copy of the Private Caveat.**

3. We note that your address is that of the property adjoining the Premises. For that reason alone, you know of (or is fixed with a duty of enquiry and therefore have constructive notice of) our client's interest in the Premises. That interest is a tenancy from 1 August 1993 to 31 August 1995 with an option to renew for another 2 years.

5. Of course if may be that, whatever your dealing concerning the building, our client's interest are not impaired, and thus our client has no cause for alarm. Please let us know if this is the position.

6. We look forward to hearing from you.

7. Please acknowledge receipt of this letter by signing on the duplicate and returning the same to us.

Yours faithfully,

Sgd.

It must be remembered that at the time this letter was written, the respondents were completely unaware of the existence of the sale agreement or its terms. That emerged much later, in the course of litigation. All that the respondents were seeking was that comfort which any business-tenant is entitled to expect. For they had hardly settled in and did not wish to experience any rude shocks. But the comfort sought by the respondents did not come. What came was a letter from Quill's solicitors in the following terms:

Darshan & Chong
Advocates & Solicitors
Messrs K.Y. Thong & Co.
4-2, Jalan Telawi Dua
Bangsar Baru
59100 Kuala Lumpur

22 December 1993
By Fax/Post

Dear Sirs,

Re: **Ground Floor of No. 12, Jalan Telawi Dua,
Bangsar Baru, 59100 Kuala Lumpur ("the Premises")**

We act for Quill Construction Sdn. Bhd.

We are in receipt of your letter dated 15 December 1993 with instruction to reply thereto.

We are instructed to state that since the sale and purchase agreement between the vendors and our clients have yet to be completed, your client's interest in the subject property should only be discussed upon the aforesaid completion.

Be that as it may, our client have expressed their intention to take possession of the subject Property upon completion since your client's right is no where enshrined in the Tenancy Agreement.

Yours faithfully,

Sgd

c.c. client.

Counsel described this letter as disingenuous. I think that he was being charitable. To my mind that letter (quite apart from its atrocious grammar) was nothing less than a wilful attempt to mislead the respondents into believing that their legitimate expectation under the tenancy agreement was at risk.

Quill's solicitors knew that the sale agreement expressly bound their client to all existing tenancies. After all, it was they who drafted the sale agreement, for its title page bears their name. They knew that their client was therefore obliged to honour all antecedent obligations owed to the respondents. In these circumstances they ought not to have written such a letter. It is no answer to say that the lay client instructed them to write it. They were under a duty to advise the client that it would be quite wrong to do so. However, considering that neither Quill nor their solicitors were parties to the appeal it is best that I say nothing further about their conduct.

If it was trouble that Quill was courting, then they received a full measure of it. On 4 January 1994, the respondents' solicitors wrote the following letter to the appellant:

K Y Thong & Co
Advocates & Solicitors

Lee Azmi Ho Tan & Kandiah
Suite 702, 7th Floor
Wisma Mirama
Jalan Wisma Putra
50460 Kuala Lumpur
4 January 1994

By Hand

Dear Sirs,

Re: Tenancy Agreement dated July 8, 1993 for Ground Floor, No. 12, Jalan Telawi Dua, Bangsar Baru, 59100 Kuala Lumpur
Landlord : Luggage Distributors (M) Sdn Bhd
Tenant : Tomlinson Antique House

By a letter dated January the tenant wishes to exercise its option in cl. 2 of the Tenancy Agreement to renew the tenancy for a further period of 2 years (ie. from 1 September 1995 to 31 August 1997).

2. By this notice, we exercise on behalf of the Tenant the said option to renew the tenancy.

3. Please acknowledge receipt this notice by signing and returning the duplicate hereof.

Yours faithfully,

Sgd.

cc: client

By a letter dated 5 January 1994, the appellant's solicitors who were, it would appear, blissfully ignorant of the earlier correspondence between the respondents and Quill, forwarded the letter of 4 January, to Quill's solicitors.

A few days later, on 12 January 1994, the respondents entered a caveat against the register document of title to the land. The Form 19B that was used for this purpose sets out the following grounds to support the entry of the caveat:

2. Alasan-alasan tuntutan kami atas tanah itu ialah:

Luggage Distributors (M) Sdn Bhd ("LD") adalah pemilik berdaftar tanah yang tercatit di dalam Jadual dibawah ini. Menurut Perjanjian Penyewaan yang bertarikh 8 July 1993 diantara LD dengan Kami berniaga sebagai Tomlinson Antique House, LD telah bersetuju untuk menyewa kepada Kami keseluruhan tingkat bawah bangunan di atas tanah tersebut dari 1 August 1993 hingga 31 August 1995 dengan opsyen untuk membaharui untuk 2 tahun lagi. Menurut surat bertarikh 4 January 1994 dari peguam kami, K Y Thong Co., kepada peguam LD, Lee Azmi Ho Tan & Kandiah, Kami telah memperlaksanakan opsyen tersebut (exercise the said option) untuk membaharui penyewaan tersebut. Oleh yang demikian, kami sekarang mempunyai hak penyewaan sehingga 31 August 1997 dan penyewaan ini boleh didafter berdasarkan Kanun Tanun Negara 1965. Kaveat ini dimasukkan untuk melindungi kepentingan kami dan kesan kaveat ini adalah terhad untuk kepentingan tersebut sahaja.

It was now Quill's turn to suffer a shock. On 18 January 1994, its solicitors wrote to the appellant's solicitors a letter in the following terms:

Darshan Chong & Co.
Advocates & Solicitors
18 January 1994

M/S Lee Azmi Ho Tan & Kandiah
Suite 702 , 7th Floor Wisma Mirama,
Kuala Lumpur **By Fax/Post**

Dear Sirs,

Re: Sale And purchase Agreement
Property: No. 12, Jalan Telawi Dua, Bangsar Baru,
59100 Kuala Lumpur and held under title Geran No. Pendaftaran 890, No Lot 22592 Mukim of Kuala Lumpur, Wilayah Persekutuan

vendor: Luggage Distributors (M) Sdn. Bhd

purchaser: Quill Construction Sdn. Bhd.

We refer to the above.

We wish to inform you that upon our attempt to present a private caveat on behalf of the purchaser's financier, we discovered that a private caveat had been lodged against the property by one, Tan Poh Tang @ Tan Tien Chi and Another on 6 January 1994.

You will no doubt appreciate that the effect of the private caveat is to prevent any dealing with the land.

In such circumstances, our purchaser's financier would naturally refrain from releasing any or any part of the loan sum on behalf on the purchaser.

By cl. l of the sale and purchase agreement dated 24 November 1993, your clients are obliged to sell the subject property free from all encumbrances save for the existing restrictions or encumbrances appearing in the document of title to our client.

In view of para. 2 above, we have our client's instruction to state that your client is in breach of the sale and purchase agreement and we have accordingly been instructed to give your client notice of the breach. In this respect, we wish to state that the time frame for the payment of the balance of the purchase price should be suspended until such time that the private caveat has been removed by your client.

We wish further to place on record that our client's financier is ready and willing to release that part of the loan sum which is sufficient to redeem the subject property from your client's charges.

We hope that your client would be prepared to instill some good sense on Tan Hon Tang to withdraw the private caveat.

Meanwhile, kindly take notice that our client would not hesitate to file proceedings against your client pursuant to the sale and purchase agreement of 24 November 1993 including any delay that our client may suffer in not being able to take possession of the subject property.

Yours faithfully,

Sgd

c.c. (i) Quill Construction Sdn. Bhd.

(ii) Overseas Union Bank Ltd.

How Quill's solicitors could make the threats contained in this letter when their client was the author of the misfortune complained of remains a mystery. So does the allegation that the sale was free of **all** encumbrances. Obviously they overlooked or paid no attention to the fact that the sale was subject to all existing tenancies. Notwithstanding all this, it appears that the full purchase price was paid over by Quill to the appellant, who, because of the respondents' caveat, was unable to effect a transfer of the land.

The appellant was no doubt eager to complete the sale. It therefore took out an originating summons under s. 327 of the Code seeking an order that the caveat be removed. This summons, which is dated 18 February 1994, was heard over several days between 24 June 1994 and 7 July 1994. The learned Judge gave his decision on 8 July 1994. He dismissed the summons but gave no written reasons for his decision. All that the notes of proceedings for 8 July 1994 reflect is that the learned Judge thought he was bound by the Federal Court decision in *Inter-Continental Mining Co Sdn Bhd. v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145. I will return to that case later.

The issues

Upon the factual matrix which I have set out, the primary issue that arises for determination is whether the respondents, upon the grounds set out in their application for the entry of the caveat, have a caveatable interest. In the resolution of this issue regard must be had to nature of the occupational rights enjoyed by the respondents in all the circumstances of the case, taking into account the effect of the exercise, by the respondents, of the option by their solicitors letter of 4 January 1994.

Before I turn to deal with the submissions of Counsel on these critical questions upon which this appeal turns there are two other matters that require consideration. The first relates to the application by the appellant to amend its Memorandum of Appeal while the second to the approach a Court should take when faced with an application for the removal of a private caveat.

The motion to amend

In the course of his opening address to us, Encik Thomas formally moved an application to add a further ground to his Memorandum of Appeal. It has to do with the respondents' failure to commence any proceedings whatsoever to enforce the alleged interest, interim protection of which had been secured by the entry of the caveat. The argument here is that such failure is fatal, having regard to the pronouncements in *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44 and *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212.

In *Temenggong*, Lord Diplock put the proposition in this way (at p. 46):

> The purposes of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the Courts.

In *Eng Mee Yong*, the same learned Judge stated the proposition in almost similar terms. This is what he said (at p. 215):

> So too in an application by the caveator (I think that he meant caveatee) under s. 327 for removal of a caveat, once the caveatee (I think it should read as caveator) has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and **in the absence of any special circumstances** be in favour of leaving the caveat in existence until proceedings brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges has been tried. (emphasis supplied.)

The proposed new ground goes on to state that this is not an appropriate case where the Court should grant the respondents an extension of time as was done in *Tan Suan Heoh v. Li Teck Ming* [1987] 2 MLJ 446, and I might add, as was also done in *Jit Kaur v. Parl Singh* [1974] 2 MLJ 199 and in *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189.

Encik Thomas in support of the motion relied on rr. 18(2) and 21(1) of the Rules of the Court of Appeal, 1994, and submitted that this Court has an untrammelled discretion even to decide a case on a ground not raised in the Memorandum of Appeal. He also referred to the recent and as yet unreported decision of this Court in *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* Civil Appeal No. A-02-2-94 where my learned brother Justice V.C. George, JCA referred to these Rules in the context of an appeal from a refusal by the High Court to set aside a judgment in default.

In opposing the application, Encik Das cited two cases decided by the Supreme Court. They are *Muniandy v. Muhammad Abdul Kader* [1989] 2 MLJ 416 and *Lee An Chor v. Southern Bank Bhd.* [1991] 1 MLJ 428. Reference may also be usefully made to the judgment of MacIntyre J in *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9 at p. 16 (FC). All these decisions are plainly binding on us. They establish the principle that save in exceptional cases an appellate Court will not entertain a point not raised in the Court below. The exceptions include a plea of illegality which may be taken for the first time at the appellate stage.

Encik Thomas submitted that the exceptions adverted to in the aforementioned cases are illustrative but not conclusive. I think that submission is correct. In my judgment, the categories of cases in which an appellate Court will admit a new point are not closed. The governing principle is this: an appellate Court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

Viewed from this standpoint, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed. Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial Court because neither consent nor waiver may confer jurisdiction where none exists: and it is not in the interests of justice that a judgment of a Court lacking jurisdiction should be permitted to stand.

In the present appeal, weighing all the relevant considerations on a scale, it was the unanimous decision of this Court that the balance of justice favoured the respondents.

If Counsel who had conduct of the case in the Court below had raised the failure of the respondents to timeously take out civil proceedings to enforce the claim, Encik Das may have, if necessary by seeking an adjournment, put in additional evidence on affidavit to show why such proceedings had not been commenced. It would have then been up to the Judge to determine whether the explanation proffered was good and, even if it was not, whether the respondents ought to be given an extension of time to commence proceedings, as was done in *Jit Kaur* (*supra*).

The failure of the appellant to raise the delay point at first instance has therefore deprived the respondents of an opportunity to offer an evidentiary rebuttal to it. Stated in this way, the matter then becomes a question of natural justice. To permit the appellant to raise the point at this the appellate stage would amount to a deprivation of essential justice from the respondents. Accordingly, the motion was dismissed with costs and the appellant confined only to those grounds pleaded in its Memorandum of Appeal.

The approach

The function of a Court hearing an application under s. 327 (1) for the removal of a private caveat has been alluded to in at least three cases. However, before I advert to the pronouncements made in those cases, it may be useful to recall to mind the words of the Code which, in this context, provides as follows:

> 327(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

In *Eng Mee Yong* (*supra*), Lord Diplock, in two passages, summarised the approach to be taken by a Court faced with such an application as is postulated by the section. This is what he said (at p. 215):

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party

Earlier, at p. 214, he rued the undesirable consequences that may follow in the absence of a timeous disposal of the application, in words that merit recollection:

> Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya (it should read as Malaysia) would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

In *Mosbert Berhad v. Stella D'Cruz* [1985] 2 MLJ 446 (SC), Seah SCJ put the test in this fashion:

> For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one.

Mosbert concerned a caveat that was expressed to bind the whole of the land in question when the caveator's claim was limited only to a part of that land. The caveat was held by the Supreme Court to be defective and incapable of amendment under s. 417 (2) of the Code and it was in that context that the words quoted above were spoken. Nevertheless, I am of the opinion that the important principle stated by Seah SCJ is of general application.

The Supreme Court in *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.* [1992] 1 MLJ 263 made it clear that any claim to a caveatable interest that is asserted

> must be minutely inquired into in order to decide whether the caveat should remain on the register document of title or be removed." (per Jemuri Serjan CJ (Borneo), at p. 270).

In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are **insufficient in law** to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.

Wong Kuan Tan v. Gambut Development Sdn. Bhd. [1984] 2 MLJ 113, illustrates how the issue of caveatability may be concluded at the first stage. There, the vendor of land sold and transferred it to a purchaser. Part of the purchase price was to be settled by the re-transfer of certain odd lots that were included in the sale. The striking feature of the case is that the relevant deed of assignment under which the re-transfer was to take place expressly made provision for the vendor to enter a private caveat. Such a caveat having been entered on the ground, *inter alia*, that the full purchase price had not been paid, the purchaser applied under s. 327(1) for its removal. The High Court ordered the removal and an appeal by the vendor to the Federal Court failed.

Hashim Yeop A. Sani FJ (later CJ, Malaya) stated the proposition (at p. 115) in language unrivalled for its clarity:

> To put it more simply, **the caveator in this case must first satisfy the Court that he has 'caveatable interest' in the land**. Only if he has such an interest can he qualify to lodge a caveat under s. 323 of the National Land Code. In the application to have the caveat removed the onus is cast upon the caveator to satisfy the Court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience the caveat should be extended until the disposal of the main action. (emphasis supplied).

At p. 116 of the report he added:

> Thus it is plain that the appellant claimed to have the right to lodge the caveat but based on cl. 4(a) of the Deed of Assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of s. 323 of the National Land Code. **Interests which are protectable by caveat are only interest recognised by the Code**. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title or interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words "any right to such title or interest" may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land. See also David Wong: Land Tenure in the Malay States - pp. 416-435. (emphasis added)

Another illustration is afforded by the facts of *Tan Heng Poh v. Tan Boon Thong* [1992] 2 MLJ 1 which concerned the interest of a beneficiary under a will. Although the correctness of this decision in another respect, not relevant for present purposes, has been called into question and effectively reversed [see *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 3 AMR 2125], it remains as authority for the proposition that a beneficiary under a will has no caveatable interest until his testator's estate has been fully administered.

The matter does not come to an end once the caveator satisfies the Court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.

At this the second stage the Court is more concerned with matters of evidence and proof offered to support the caveator's claim. *Million Group Sdn. Bhd. v. Lee Shoo Khoon* [1986] 1 MLJ 315 affords a good illustration. The caveator in that case alleged that the registered proprietor of certain property had sold it to him under a written agreement. There had been an offer and a counter-offer followed by discussions on a draft written agreement in which one of the clauses had, at the instance of the vendor, been deleted. As a result of those discussions, an engrossed agreement executed by the caveator was sent to the vendors' solicitors together with a cheque for 10% of the purchase price. The letter under cover of which these were sent stated that the deposit was not to be returned until after the vendor had executed the agreement. Three months later, the vendor's solicitors wrote saying that the vendor could not agree with some of the terms in the written agreement. A caveat was

entered by the purchaser. The vendor applied, under s. 326 of the Code, to the Land Administrator who issued a notice to the caveator to show cause why the caveat ought not to be removed. The caveator applied to the Court to have the caveat extended. Shankar J (as he then was) dismissed the application after undertaking a careful examination of the evidence adduced to support the existence of a serious question to be tried. He held that on the evidence presented to him there was no concluded contract.

Although that case was decided under s. 326, the approach there adopted applies to an application made under s. 327(1) and we entertain no doubt whatsoever that Shankar J was right in the approach he took. The case illustrates the proposition that, although a caveator may, in his application for the entry of a caveat, show a *prima facie* caveatable interest in the property in question, he may fail to adduce satisfactory evidence at the hearing of the application for its removal so that the Judge would be entitled to hold that the claim in support of the caveat has not been made out and that there is therefore no serious question to be tried.

The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* (*supra*) as 'the balance of convenience'. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.

It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not be permitted to remain on the register a moment longer than is absolutely necessary.

The relevant statutory provisions

Before I turn to deal with the submissions made by Counsel, and in order to appreciate those submissions, it is necessary to refer to those provisions of the Code that are relevant to this appeal. They are as follows:

> Section 323(1) The persons and bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) ...
>
> (c) ...
>
> Section 213(1) In this Act `tenancy exempt from registration' means:
>
> (a) any tenancy or sub tenancy for a term not exceeding three years granted pursuant to s. 223; and
>
> (b)
>
> (2) ...
>
> (3) Notwithstanding the provisions of subsection (2), no tenancy exempt from registration granted after the commencement of this Act shall be binding on:
>
> (a) any person or body to whom the grantor subsequently transfers the reversion expectant thereon, or to whom he grants any lease, sub-lease, tenancy or charge, or in whose favour any lien over that reversion is subsequently created; or

(b) any person or body claiming through or under such a person or body,

unless, prior to the date on which the dealing referred to in para. (a) takes effect, the tenancy has become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

(4) Where any land or lease subject to a charge or lien is transferred pursuant to an order for sale under Chapter 3 of Part 16, the provisions of sub-section(3) shall have effect as supplemented by sub-section (2) of s. 267 or, as the case may be, by that sub-section as applied by sub-section (3) of s. 281.

(5) No tenancy exempt from registration shall be capable of being charged under this Act.

Section 221(1) Subject to the provisions of ss. 225 and 226, the proprietor of any alienated land may grant leases of the whole or any part thereof in accordance with the following provisions of this section.

(2) Every lease granted pursuant to this section shall be for a term exceeding three years.

(3) ...

(4) Every such lease shall be granted by an instrument in Form 15A: and in any case where the lease relates to a part only of any alienated land, there shall be attached to the instrument a plan and description sufficient to enable the part to be accurately identified.

Section 224 in determining for the purposes of this Chapter whether any term for which land is granted exceeds any specified number of years:

(a) ...

(b) if the term is for a fixed period, no account shall be taken of the fact that it is capable of renewal in pursuance of an option, or is liable to be determined before the expiry of that period by the giving of notice or the happening of any other event.

I propose to say nothing for the moment about the meaning and effect of the sections which I have set out above. I shall deal with these when addressing my mind to the several arguments addressed to us by Counsel.

The submissions of Counsel

The submissions made on behalf of the appellant may be summarised as follows: (1) At best, all that the respondents (whom I shall refer to as "exempted tenants") had by way of the tenancy agreement was a tenancy exempted from registration (which I shall refer to as an "exempted tenancy" throughout this judgment) for two years with an option to renew it for a further period of two years; (2) The respondents, by exercise of the option would obtain another exempted tenancy at the end of the first term; (3) The only way in which the respondents as exempted tenants may receive protection is by having their tenancy endorsed on the register document of title as provided by s. 213(3) of the Code; (4) An exempted tenancy does not confer a caveatable interest and is therefore incapable of protection by the entry of a private caveat; (5) The respondents, despite their failure to have the tenancy endorsed in accordance with s. 213(3), are nevertheless entitled to quiet enjoyment in the hands of Quill because the latter have express or actual notice of the former's occupational rights; (6) Where one has a general provision, such as s. 323 (1), on the one hand, and a specific provision, such as s. 213(3) which especially provides for a method of protecting exempted tenancies, then, *generalibus specialia derogant*; (7) A private caveat lies only to protect registrable interests. Its feature is that it is temporary, pending either the registration of title or a registrable interest or the enforcement of such title or registrable interest by proceedings timeously brought for that purpose.

The submissions in response to the appeal may be thus summarised: (1) The pivotal part of the respondents' case lies in the exercise by them of the option on 4 January 1994. It is the exercise of the option that led to the entry of the caveat; (2) The sale agreement is so far as it binds Quill either does not mean what it says or it is not the whole agreement between the parties; (3) By the exercise of the option the respondents enlarged their interest in the land and had in consequence become lessees, entitled to registration of their lease. In other words, the exercise of the option converted the respondents from exempted tenants to lessees; (4) The option mentioned in the second recital is unconditional in its terms and, on its true construction, is an option clause that required merely an unilateral act on the part of the respondents to obtain a further term. Such an option clause is treated by the authorities as a renewal clause; (5) What the respondents had in reality was a 4 year lease broken up for convenience into 2 segments of 2 years each. The terms upon which the respondents were to occupy the premises during the second segment were to be the same as those under the first segment except for the renewal clause; (6) The option clause is not void for uncertainty; (7) Section 224(b) of the Code does not apply to the respondents because the phrase "capable of renewal" appearing in it refers to a situation where an option remains unexercised, whereas in the instant case the option had already been exercised before the entry of the caveat. Due regard must be had to the tense which has been used by the legislature. Accordingly, the section is to be applied to the facts as they exist at the time the right is asserted and opposed and not at any earlier stage, such as the time at which the agreement came into existence; (8) The protection given by s. 213(3) is not exhaustive. Section 323(1) does not by its terms exclude an exempted tenant from entering a caveat, so that a person who has some other remedy under the Code may also have resort to that section; (9) Alternatively, by the exercise of the option the respondents have a contractual right to occupation with a right to specific performance in equity of the option, thereby vesting in the respondents an interest in the land. In support of this last argument, reliance was placed on *Intercontinental Mining* (*supra*) and a *Jayaraman v. Kwong Yik Bank Berhad* [1994] 2 CLJ 695, Counsel emphasising that he fell back on these cases only if he failed in this primary argument that the respondents are lessees of the premises.

Based on these submissions there are two possible approaches I could take to this case. The first is to deal with each of the arguments advanced on behalf of both parties: the second is to undertake an examination of the central issues in this appeal and, in the course of my reasoning, to deal with each argument that merits consideration. Having given the matter careful thought, I have decided upon the latter approach.

Lease or tenancy?

(A) Construction of recital (2)

The first question that I think ought to be addressed is that relating to the nature of the respondents' occupation of the premises. If, as the respondents claim, they are indeed lessees, then it cannot be gainsaid that their contract for a lease, though unregistered, gives them an undoubted right to enter a private caveat upon the title.

Equity looks on that as done which ought to be done: *Walsh v. Lonsdale* [1882] 21 Ch. D. 9. In accordance with this maxim, equity treats an agreement to grant a lease on the same footing as a lease (which is a registrable interest under the Code). Specific performance of the agreement may therefore be ordered and the lessor directed to execute a formal lease in a registrable form. Alternatively, a declaration in suitable terms may be granted: *Siew Soon Wah v. Yong Tong Hong* [1973] 1 MLJ 133. The right of a lessee in these circumstances

may be protected by the entry of a caveat pending the trial of his action for specific relief or, to put it in slightly different parlance, the lessee has a caveatable interest: *Woo Kok Wan v. Loo Pek Chee* [1975] 1 MLJ 156.

By definition, a lease is for a term exceeding three years [s. 221(2) (*supra*)]. The tenancy agreement in the instant case is for an initial period of two years. There is the mention in the recital of an option for a further period of two years. Now, does that amount to anything at all? I think that it does. The fact that there is no mention of it anywhere else in that poorly drafted document does not make any the less an option. The principles governing the construction of recitals in an agreement as opposed to its operative parts are well settled.

It is a cardinal rule in the interpretation of contracts that recitals may be taken into account as an aid to construction and this is all the more so where there is ambiguity in the document. Further, in an appropriate case the Court may construe a recital as carrying with it an obligation to carry into effect that which is recited.

In *Orr v. Mitchell* [1893] AC 238, Lord Macnaghten laid down the following principle in relation to the use to which recitals may be put when interpreting a contractual document:

> When the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous they cannot be corrected by reference to other parts of the instrument. When those words are susceptible of two constructions the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning. **In order to justify a reference to the context for this purpose, it is not necessary that the language of the dispositive or operative clause should be ambiguous in the sense that without some help you cannot tell which of two meanings should be taken. The rule applies though one of the two meanings is the more obvious one, and would necessarily be preferred if no light could be derived from the rest of the deed**. For the purpose of construing the dispositive or operative clause, the whole of the instrument may be referred to though the introductory narrative or recitals leading up to that clause are, perhaps, more likely to furnish the key of its true construction than the subsidiary clauses of the deed. (emphasis is mine.)

Authority for the proposition that any words in a contract which show an agreement to do a thing amounts to an obligation and that no special language is necessary is to be found in *Aspdin v. Austin* [1844] 1 QB 671, where Lord Denman said that:

> where words of recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non performance, as if the instruments had contained express covenants to perform them.

In *Sampson v. Easterby* [1830] 9 B. & C. 505, a lease of an undivided third part of mines recited an agreement made between the lessee and the lessor under which the lessee was to pull down an old smelting mill and replace it with another of larger dimensions. The lease itself contained no such covenant, but contained a covenant to keep the new mill in repair. Lord Tenterden CJ said:

> It appears evidently to have been the intention of the parties that the building should be erected; and as no precise form of words is necessary to make a covenant, we think the recital of the agreement that the building should be erected, followed by the express covenants to maintain and leave it, do amount to a covenant in law to erect the building.

On appeal [(1830) 6 Bing 644] the decision was affirmed. Alexander C.B. said:

> We are all of opinion that in this demise there is a distinct covenant on the part of the defendant below to erect a smelting mill. Any words in a deed which show an agreement to do a thing amount to a covenant... and it is here recited that the defendant and others had, with the permission of Sir C. Turner and two others, taken down a smelting mill, and did engage to erect at their own expense a smelting mill of larger dimensions.

Applying these principles of construction, it is my considered view that although there is no mention of an option anywhere else in the tenancy agreement save in the recital, objectively tested, it was the intention of the parties that the respondents shall have an option to renew the tenancy for a further two year period. The recital, in the circumstances of the present case, creates a right in the respondents to such an option and in the appellants, and all those who take the land subject to the tenancy, a corresponding obligation to honour that option.

(B) Voidness for uncertainty

The next question that requires to be addressed is whether the option is void for uncertainty. In order to deal with this question it is important to recall the form in which the right is expressed in the second recital. The material words are "plus a further 2 years option". There is no mention of the manner or the time within which the option is to be exercised or of the covenants which are to operate during the second term. Can it then be said that the option is void for uncertainty? In my judgment, that question falls to be answered in accordance with settled principles.

Any examination of the law upon this subject must of necessity commence with a consideration of the rather controversial decision in *King's Motors (Oxford) Ltd. v. Lax* [1969] 3 All ER 665. It was there held that an option in a lease for a further term "at such rental as may be agreed upon between the parties" was, in the absence of an arbitration clause, void for uncertainty. That case was applied by our Supreme Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1987] 1 MLJ 236, where an option for a further term for three years, "at a rent to be agreed upon" but otherwise upon the same terms and conditions with the exception of the option clause did not give rise to any legal obligation until, *inter alia*, the rent had been agreed upon.

It is noteworthy that almost every case decided by an English Court after *Lax* (*supra*) has sought to distinguish it. See: *Smith v. Morgan* [1971] 2 All ER 665; *Rothwell v. Wakeling* [1975] 29 p. & CR 234; *Trustees of National deposit Friendly Society v. Beatties of London Ltd.* [1985] 2 EGLR 59.

The strongest possible indication that *Lax* was wrongly decided is to be found in the decision of the English Court of Appeal in *Corson v. Rhuddlan Borough Council* [1990] 1 EGLR 255 where the facts were these. The lease of a golf club for a term of 21 years contained an option in favour of the tenants to take a new lease of the demised premises from the expiry of the existing term for a further 21 years at a rent to be then agreed, such rent not in any event to exceed £1,150 per annum payable under the existing lease. The tenants claimed to exercise the option and stated that they were willing to pay an annual rent of £1,150 under the terms of the new lease. The landlords wished to negotiate for a higher rent and later asserted that the option was invalid. The Judge at first instance decided that it was right to imply a term as to a fair rent and that the option clause on its true construction, required the parties to agree to a fair rent, with an upper limit of £1,150. The landlords appealed. The Court of Appeal dismissed the appeal, inclining in favour of upholding the bargain by relying

upon the textbook cases of *Hillas & Co. v. Arcos* [1923] 147 LT 503 and *Foley v. Classique Coaches* [1934] 2 KBI, with Ralph Gibson LJ expressing the approach that is to be adopted in the following terms:

> The task of the Court therefore, is to construe the option clause in the second lease in accordance with the approach of their Lordships in *Hillas & Co v. Arcos*. It must be construed in the context of the entire transaction of which the second lease formed part.

Addressing the decision in *Lax* (*supra*), the same learned Lord Justice said (at p. 259-260):

> There is said to be authority in the way of taking that course. In *King's Motors (Oxford) Ltd. v. Lax* [1970] 1 WLR 426 the option clause was contained in a seven-year lease of a petrol station and provided for a further term of seven years. As in this case, there was a requirement as to the giving of notice six months before the end of the term and of due performance of the covenants in the lease, but the rent was to be "as may be agreed between the parties". There was no statement as to the maximum rent. Mr Orr submitted that that case had been approved in *Beer v. Bowden* [1981] 1 WLR 522 by this Court and that the reference in the option clause in this case to a maximum rent did not serve to distinguish this case from the grounds of decision in *Lax's* case. As was pointed out in the course of argument by Balcombe LJ, the correctness of the decision in *Lax's* case was not treated as a matter of decision for this Court in *Beer v. Bowden*. The *Lax* case was concerned with an option clause, as contrasted with the rent revision clause before the Court in *Beer v. Bowden* and was thus regarded as distinguishable. It is, again, I think, not necessary for this Court to decide whether the decision in the *Lax* case was correct because the provision for a maximum rent is, in my judgment, a material distinction. **For my part however, I incline to the view that it was, as Mr George submitted, wrongly decided, and I would respectfully differ from the view of Goff LJ that the option clause was in that case precluded from being a valid contract because the rent was not ascertainable**. I see no reason why different principles should be applicable to the construction, so far as concerns voidness for uncertainty of a rent revision clause in an existing lease as contrasted with an option for a new lease or further lease in an existing lease. *Foley v. Classique Coaches Ltd.* established that the presence of the words "to be agreed by the parties" is not fatal to the existence of an enforceable contract if it is otherwise plain, upon the construction of the whole of the document in its context, including of course those words, that there was a clear contractual intention of the parties to be bound by the clause. A provision that the rent should be a fair rent could, I think, have been implied in the *Lax* case. I can see no risk of difficulty arising from such a conclusion. If parties intend an option clause to be no more than an indication that the landlord will be willing to consider a request for a new lease without obligation and on terms to be agreed, there is no difficulty in making that intention clear if there is thought to be any utility in including such a statement in the document. (emphasis supplied).

Let me say at once that the views expressed by Ralph Gibson LJ in *Corson* (*supra*) accord with my own. In my opinion, the time has come to openly repudiate the decision in *Lax* (*supra*) rather than to make an attempt at circuitous logic by distinguishing it from case to case. For my part I would take the more direct approach and say that *Lax* was wrongly decided and that it should no longer be followed here.

Lewis v. Stephenson [1898] 67 LJQB 296 was also cited and relied upon by respondents' Counsel in support of his submission that the option was not void for uncertainty The head-note of that report reads as follows:

> Premises were let by agreement in writing, not under seal, for a term of three years commencing from a certain date, at a clear yearly rental of 80RM and 8RM yearly for the use of water, payable on the usual quarter days, 'with the option of renewal':- Held, that the words 'with the option of renewal' were sufficiently definite to enable the Court, at the instance

of the tenant, to carry them out by a decree for specific performance for a renewed agreement for the same period, on the same terms, except as to renewal, as those contained in the agreement.

The judgment of Bruce J is of such importance that I shall quote from it *in extenso*. This is what he said:

The question to be decided, then, is whether the defendant can claim against the plaintiff specific performance of the alleged agreement to renew.

Upon this question two points were raised by the plaintiffs Counsel - first, whether the plaintiff, as purchaser of the lease, is to be fixed with notice of the contents of the lease to the defendant; and secondly, whether the words in the lease relating to renewal are sufficiently definite to enable the Court to carry them out by a decree for specific performance. On the first point I entertain no doubt. It was expressly decided by Lord Loughborough in *Taylor v. Stibbert*. The Lord Chancellor in that case said:

> It has been determined, that a purchaser being told, particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease, the tenant had, which was a surprise upon him.

In that case the very question was raised whether the purchaser was affected with notice of a covenant for renewal contained in a lease which he had not seen, and it was held he was. That decision is followed by Lord Eldon in the case of *Daniels v. Davison*. At p. 254 of the report the Lord Chancellor said:

> My opinion therefore, considering this as depending upon notice, is, that this tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of subsequent purchaser, who made no enquiry as to the nature of his possession.

These cases have been followed by a long line of cases, and the principle of them was approved by the Judicial Committee of the Privy Council in *Barnhart v. Greenshields*.

The second point is a much more difficult one. What meaning is to be given to the words 'with the option of renewal'? It was contended on behalf of the plaintiff that the words did not define either the length of the period for which the renewed lease was to be granted, or the terms of the renewed lease, or the person by whom or the period within which it was to be exercised. Let me consider these points in order. What does the word 'renewed' signify? According to Dr. Johnson, one meaning of the word is 'to repeat; to put again in act.' In accordance with this meaning of the word is the *dictum* of Lord Abinger in *Price v. Asheton*, where the learned Judge, speaking of a renewed lease, says: 'That is a renewal of the old lease; and therefore, in point of duration, coinciding with the former lease.' And it is to be gathered from the same judgment that the Chief Baron considered that a renewed lease meant not only a lease coinciding with the former lease in duration, but, further, a lease containing the same terms. This *dictum* of Lord Abinger that a renewed lease means a lease of the same duration as the original lease is cited apparently with approval in *Fry on Specific Performance*, and in other books of authority. But this pronouncement of Lord Abinger can, I think, only be treated as a *dictum*. There was in point of fact in that case no agreement to grant a renewed lease, and in the correspondence which was relied upon as affording evidence of the alleged agreement the word 'renewal' did not occur in any letter of the defendant. It only occurred once in a letter of the plaintiff, and the defendant in his answer to that letter did not adopt the word renewal, but spoke only of his intention of granting 'a lease.' Lord Abinger's judgment was given on an application for an interlocutory injunction. When the case came on for hearing before Mr. Baron Alderson, that learned Judge held that there was no agreement to grant a

renewed lease, in fact no definite agreement at all. If there were any agreement, he thought it was an agreement in which time and rent were left to future regulation, and he dismissed the bill for an injunction with costs.

It seems to me that the judgment of Mr. Baron Alderson, while it does not support the *dictum* of Lord Abinger, does not in any way conflict with it - see *Hyde v. Skinner* and *Furnival v. Crew*. I feel the greatest difficulty in differing from even a *dictum* of Lord Abinger, and it seems to me that it is only to give to language its natural meaning to hold that a renewal of lease means the renewing of the old lease for the same period and on the same terms. Unless such a meaning is given to the word 'renewal,' the words in the present agreement are deprived of all legal significance, and I am reluctant to come to the conclusion that the words inserted in a legal document ought to be taken as having no effect. But then it is said that if the terms of the renewed lease are to be the same as the terms of the original lease, the renewed lease must contain a stipulation for renewal, and so on in perpetuity. But such a construction is, I think, manifestly unreasonable. "With option of renewal" does not mean with continued options of renewal after renewal. There is, I think, sufficient authority to support the view that an express provision that all covenants in the original lease shall be inserted in the renewed lease will not include a covenant for further renewal- see *Iggulden v. May* and *Hyde v. Skinner*. The Court leans against a construction for perpetual renewal unless there be express words to show that it is clearly intended *Baynham v. Guy's* Hospital.

The next point to be considered is whether the words define the persons by whom the option is to be exercised. It is well established principle that every doubtful grant is to be construed in favour of the grantee, and I cannot entertain a doubt that upon the proper construction of the words the option is vested in the lessee - see *Doe d. Webb v. Dixon*. As to the period within which the option is to be exercised when nothing is specified, I think I am doing no violence to the ordinary canon of construction when I say I think that must be taken to mean within a reasonable time before the expiration of the original lease; and as in the present case the defendant applied for a renewal in the month of March, and the original tenancy did not expire until June 24, I think that the application for renewal was within time.

Applying the interpretative guidelines adverted to and applied by Bruce J to the second recital in the tenancy agreement, it is my considered view that the option was not void for uncertainty. Indeed, it was valid and available for exercise in January 1994.

Further, I think that, in the circumstances of this case, it would not be a strain upon the powers of this Court to imply the requisite term in the tenancy agreement on the basis of necessity (see *Liverpool City Council v. Irwin* [1977] AC 239; *Tai Hing Cotton Mills v. Liu Chong Hing Bank* [1986] AC 80) or for the purpose of lending it business efficacy (see, *The Netherlands Insurance Co. v. Karl Ljungberg & Co.* [1986] 2 MLJ 32).

While on the subject of implied terms, let me digress for a moment to say that much learning may be acquired upon the subject from a reading of the judgment of Edgar Joseph Jr. J, (now FCJ) in *Lim Soo Seng v. Majlis Perbandaran Pulau Pinang* [1990] 1 MLJ 22. No doubt that decision was reversed by the Supreme Court. (See [1991] 1 MLJ 162). As a matter of pure *stare decisis* the latter constitutes binding precedent. But, having read both judgments, I respectfully say that the law as stated by Edgar Joseph Jr. J in the High Court is to be preferred to that followed by Harun Hashim SCJ in the Supreme Court. Fortunately, it is no part of my function in this case to say anything more about it.

Reverting to the present appeal, the respondents were businessmen looking for some security of tenure in order, no doubt, to establish a goodwill in their trade. I think they were, on a reading of the second recital, entitled to assume that they would be entitled to elect, before the end of the first, term, whether they wanted another two year term upon the same mutual

covenants, save and except for the right to a further renewal. Speaking for myself, I find no difficulty in implying a term in the tenancy agreement which will give effect to this legitimate expectation on the part of the respondents.

In commercial transactions nothing is more meaningful than a business sense approach to questions of interpretation. As Brightman LJ (as he then was) observed in *Law Land Company Ltd. v. Consumers' Association Ltd.* [1980] 255 EGLR 617:

> Some modification has to be made to the strict wording of the rent review clause if it is to work. I fully recognise the attractiveness of the arguments advanced by [Counsel], but they lead to a solution which, to my mind, is not practical and cannot possibly have been contemplated by the parties. The lease is a commercial document and we have to find a commercial solution to the problem posed.

In a similar vein, Lord Diplock in *Antaios Cia. Naviera S.A. v. Salen Rederiema A.B.* [1985] AC 191 said:

> While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

Adopting this approach to the document that is now before this Court, it is plain that what the respondents had was a tenancy for a period of two years with an option to obtain a further tenancy for a further two years. Since the recital is silent as to the time frame within which the option is to be exercised or the mode in which it is to be exercised, I am of opinion that it may be exercised by giving notice within a reasonable time before the expiry of the first term of two years. As such I hold that the option had been properly exercised within a reasonable time and that therefore the respondents are entitled to a second term of two years on the same terms as those contained in the tenancy agreement except for the option contained in its second recital.

(C) Interpretation of s. 224(b)

This is not a case where it is alleged **as a matter of evidence** that the parties *ab initio* orally agreed to create a lease. The respondents' case rests entirely on the construction to be placed on the tenancy agreement. Here, s. 224(b) of the Code is against the respondents. That section, upon a plain reading of it, expressly prohibits any option for renewal from being taken into account when determining the length of a tenancy for a fixed period.

As I have said, what in reality the respondents got was a tenancy for a fixed period of two years with an option for a further two years. The Code in s. 224(b) directs that no regard is to be had to the period under the option. Therefore the respondents were occupying the premises as exempted tenants. In my judgment, they are not, and never were, lessees.

The submission that s. 224(b) does not apply to this case because the option had already been exercised is also devoid of any merit. The phrase "is capable of renewal" appearing in that section if read in the way Counsel has suggested will lead to absurd consequences. It would in effect result in the tenancy agreement meaning one thing at one point in time and something else at a later point in time. That cannot be.

The authorities relied upon by Encik Das, namely, *Kuwait Minister of Public Works v. Snow & Partners* [1984] 1 All ER 733 and *Nagpal Printing Mills v. Municipal Corporation of Greater Bombay* [1987] 1 MCC 411 are of no assistance at all. They are decisions upon the

phraseology used in the context of the respective statutes that came up for consideration. I agree that they are authority for the proposition that due regard must be had to the tense used by Parliament in a statutory provision enacted by it. But this argument does not take the respondents' case very far.

In my judgment, the effect of the exercise of an option is to create a fresh term taking effect from the end of the previous term. That this has always been the law is demonstrated by the decision of the High Court of Australia in *Gerraty v. McGavin* [1914] 18 CLR 152 at p. 163, which I drew to the attention of Counsel during argument. *Lewis v. Stephenson* (*supra*) also supports this proposition.

I believe that the answer to Counsel's submission lies in his response to the question put to him by my learned brother V.C. George JCA, in the course of argument. He asked of Encik Das as to when the respondents got the four year lease. To this Counsel responded that it was when the option was exercised. Since that is the respondents' case, it is squarely met by the principle I adverted to a moment ago. The exercise of the option by the letter dated 4 January, though valid, entitled the respondents to continue to remain on the premises for two years only upon the expiry of the first term and not forthwith upon the exercise and certainly not from the date on which the tenancy agreement was executed.

Now, there is an important presumption when it comes to construing a legislative enactment. It is this. Parliament is presumed to know the law at any time it exercises its legislative authority upon a subject. In this context, Parliament is irrebuttably presumed to have known the law relating to options in a tenancy or a lease. It obviously meant to catch the mischief of any argument that the option period is to be included when calculating the length of a term. That is why it enacted of s. 224(b) in clear and unequivocal language. That section is to be applied to the language of the document that falls to be interpreted. The phrase relied upon by Counsel to suggest that his case fell outside the purview of the section has to be read in the context of the section and not in isolation or in a narrow and pedantic manner as he has sought to do.

In my judgment, all that s. 224(b) says is that when deciding what number of years any written instrument has created, no regard is to be had to the right of a tenant under any option clause to obtain for himself a further term or terms under that instrument. It does not matter that at the time the section falls to be construed any option for renewal has already been exercised by the tenant. The section deals with what a tenant had at the outset and not what he has mid-stream. Were it otherwise, a tenant who takes an initial tenancy for a year with an option for a further three years will be able, by his unilateral act of exercising the option, say, one month after commencement, to argue that *ab initio* he has a lease for four years.

An acceptance of Counsel's argument would denude the section of any content, frustrate legislative intention and achieve the very end which Parliament had aimed at ridding. Accordingly, I have no difficulty whatsoever in entirely dissenting from the submissions of Encik Das on this point and in holding that the respondents were, at all material times, exempted tenants. The interest they had was capable of adequate protection by means of an endorsement on the register document of title. They had failed to do this. The question is: can they nevertheless have resort to the provisions of s. 323(1) of the Code and protect themselves by entering a private caveat? It is this question that I now turn to address.

Caveatable interest

To paraphrase s. 323(1)(a) of the Code, a private caveat may be entered at the instance of any person or body who claims either:

(1) the title to land; or

(2) any registrable interest in Land.

The parameters of caveatability under s. 323(1)(a) are therefore circumscribed by these words: "title" and "registrable interest". It is only one who makes a claim to either of these in land may enter a private caveat.

Although the words "title" and "registrable interest" are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, s. 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

In my judgment, the position that obtains under the Code, so far as is relevant to the present appeal, may be stated in the following way. The Code creates three categories of interests in land. They are as follows.

Category 1: *Registrable interests in land.*

Only certain interests are capable of registration. Within this are two subcategories, namely:-

(a) Registered title. This may be in perpetuity or for a term of years. It pertains to ownership of land. The "owner" is termed by the Code as a "registered proprietor",

(b) Registrable interests falling short of ownership. These are leases charges and easements.

Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in s. 340(1), confers indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions which, if established, may operate to defeat such registered title or interest;

Category 2: *Interests that are incapable of registration.*

These include tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title;

Category 3: *Caveatable interests*.

These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of s. 323(1)(a), it is only a claim to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat. Cases falling under category (2) are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest. Protection for such interests must be secured in the manner prescribed by the Code.

I fear that any other construction upon s. 323(1)(a), especially one that places a meaning wider than that I subscribe to, may result in judicial disobedience to the will of Parliament: and that in my view should be avoided at all cost.

Support for the view I have expressed may be found in two decisions of the Privy Council on appeals from our former Federal Court. They are *Temenggong Securities* (*supra*) and *Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267.

In the first of these, Lord Diplock explained the scheme of the Code in language that merits recollection. He said (at p. 45):

> In each of the States of Malaya what corresponds in English land law to the freehold interest in land is vested in the State. Land may be disposed of by the State either in perpetuity or for a term of years, in either case in consideration of the payment of a rent, and while so disposed of is known as alienated land. The National Land Code applies a modified form of the Torrens system of registration of titles relating to alienated land.
>
> The person in whom is vested land which has been disposed of by the State upon these terms is referred to in the Code as the "proprietor" of the land and his interest as the "title" to the land. Under the Code interests in alienated land are divided into two categories: those which are registered and those which are not. The only interests capable of being registered are title, leases (including subleases) for a term exceeding three years, charges on the land and easements over the land. Registered title to land can be transferred and other registered interests in land can be created and transferred by registered dealings only. These dealings take effect when a written instrument in the appropriate form provided for by the Code is presented for registration at the Registry. The title to land or to an interest in the land which is conferred by registration is indefeasible in the absence of fraudulent or other similar misconduct on the part of the person in whose name the title or interest is registered; but such misconduct does not defeat the registered title or interest of a *bona fide* purchaser for value from the guilty party or any person claiming through such a purchaser.
>
> The restriction under the Torrens system on the kinds of interests in land which are capable of being registered does not prevent the creation of other kinds of interests in land or dealing with them. In particular it does not prevent or restrict the creation of beneficial interests in land whether under express trusts or under constructive or resulting trusts arising by operation of Malayan law, which in this respect is derived from the rules of equity in force in England in 1956. But the temptation to regard the distinction between registered and unregistered interests in land under the National Land Code as similar to the difference in English law between legal estates and equitable interests in land should be resisted, for the analogy is not close and is liable to be misleading.
>
> Interests in land that are unregistrable fall into three categories viz. tenancies for a term of less than three years, liens created by deposit of instruments of title as security for a loan, and beneficial interests under a trust affecting the land. Where, however, the person registered as proprietor of land holds the title as bare trustee for a beneficiary, the beneficiary may convert his beneficial interest into a registered interest by requiring the registered title to be transferred to him.
>
> The National Land Code provides means of protecting unregistered interests in land from being overridden by *bona fide* purchasers for value of a registered title or interest. Short term tenancies are protected by endorsing the register document of title to the land with the words. "Exempt Tenancy Claim." This preserves the tenancy as against subsequent grantees of the land or of any interest in it. Protection to all other kinds of unregistrable interests is provided by entering a caveat in the register on the document of title to the land. Until it is removed a caveat imposes restrictions on the entry in the register of dealings in the land.

In the latter case, the same learned Law Lord reiterated the position in the following passage (at p. 269):

> In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning

> of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors. v. V. Letchumanan*, to which reference may conveniently be made.

I pause to emphasise that the approach to the scheme of the Code that commended itself to the Privy Council does not affect the enforcement of rights *in personam* arising under a contract. That the Code itself recognises such rights finds expression in s. 206(3). See also *Mercantile Bank Ltd v. Official Assignee* [1969] 2 MLJ 196.

Reverting to the observation I made earlier in this judgment, an agreement to grant a lease confers upon the grantee a right *in personam* which he may enforce against the grantor and all his successors in title save a *bona fide* purchaser for value who obtains his title without notice of the agreement. See s. 26(b) of the Specific Relief Act, 1950; *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224.

If the Court should decide in the grantee's favour, then, in addition to or in lieu of decreeing specific relief, it may exercise its jurisdiction under s. 417(1) of the Code and grant relief *in rem* by directing rectification of the register document of title to reflect the lease. This is precisely what was done in *Othman & Anor. v. Mek* [1972] 2 MLJ 158, although that was a case of a sale, not a lease. The grant of specific relief in such circumstances does no violence to the language or intention of s. 340(1) of the Code. Neither is there any erosion of the *in rem* action conferred by sub-section (2) of that section. By succeeding in an *in personam* action, a plaintiff gets the registered proprietor to defeat his own title: *Oh Hiam & Ors. v. Tham Kong* [1980] 2 MLJ 159.

To summarise, a claimant to any **title or registrable interest** in land may frame his case in one of two actions. If the facts pertaining to his claim enable him to bring his case within those vitiating categories specified under s. 340(2) of the Code, then, he may frame his case under one or more of those categories as an action *in rem*. If on the other hand, he is unable to bring himself squarely within the exceptions in favour of defeasibility, then, all is not lost to him: for, if he is able to constitute his complaints as an action *in personam* he may achieve the same result. Of course, as an action *in personam*, his claim may be subjected to all those discretionary considerations that operate in the grant or refusal of specific relief. In either case, he may be entitled to secure the *status quo* by the entry of a private caveat.

In matters of this nature it is always of immense benefit to keep in mind the words of Thomson J, (as he then was) in *Bachan Singh v. Mahinder Kaur & Ors*. [1956] MLJ 97, where he said:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code which has the same effect in our law as appearance before the Praetor in the law of Rome, delivery of seisin in the old English feudal law and infeftment by registration in the Register of Sasines in the modern Scots law.

> Now, these observations are not academic. They are made to remind myself and to remind Counsel of something we all know but are apt to overlook and which is a consideration in the light of which we must consider the particular transaction with which I am concerned in this case.

The respondents in this case are, as I have already held, exempted tenants. As such they have no caveatable interest in the land. However, for reasons I have given, they are not bereft of a remedy against Quill.

There is another compelling reason for holding that the respondents have no caveatable interest in the land. It lies in the rule of construction expressed in the maxim *generalibus specialia derogant*. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

Thus in *Commissioner of Income Tax v. Shahzada Nand & Sons AIR* 1966 SC 1342, where (at p. 1347) Subba Rao J, said:

> Another rule of construction which is relevant to the present enquiry is expressed in the *maxim generalia specialibus non derogant*, which means that when there is a conflict between a general and a special provision, the latter shall prevail. The said principle has been stated in *Craies on Statute Law* 5th Edn., at p. 205, thus:
>
> The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

See also *Public Prosecutor v. Chew Siew Luan* [1982] 2 MLJ 119.

In the present case, s. 323(1) is a general provision while s. 213(3) is a special provision that exclusively deals with the mode afforded for the protection of exempted tenancies and with the consequences of endorsement I would also observe that s. 267(1) of the Code demonstrates the nature and extent of the protection that endorsement confers upon an exempted tenancy. That section, *inter alia*, provides that a purchaser of land at a public auction consequent upon foreclosure proceedings shall take his title subject to an endorsed exempted tenancy.

Accordingly, I reach the inescapable conclusion that the only remedy available **under the Code** to an exempted tenant is the endorsement of his exempted tenancy upon the register document of title. He cannot secure his position by the entry of a private caveat.

In arriving at this conclusion, I have not overlooked all that was said by the Supreme Court in *Chiu Wing Wa v. Ong Beng Cheng* [1994] 1 CLJ 313 and in *Jayaraman v. Kwong Yik Bank Berhad* (*supra*). In the former, the question that fell to be considered was whether a failure to endorse an exempted tenancy also deprived the tenant of the protection of the Control of Rent Act, 1966. It comes as no surprise that the Supreme Court held that the two statutes were to be harmonised by having resort to the content of the maxim *generalibus specialia derogant*: the Code being the general provision, and the Act of 1966 being the special provision. The reasoning of their Lordships of the Supreme Court accords entirely with the views I have expressed upon the question of interpretation.

In *Jayaraman* (*supra*), Wan Yahya bin Pawan Teh SCJ, delivering the judgment of the Supreme Court said (at p. 698 of the report) in regard to s. 323(1) of the Code:

> However in various recent cases the Court have given the section, in particular, sub-section (1)(a) a wider and liberal interpretation to include purchasers of land, company owners, chargees, **tenants** and even an option holder: see *Macon Engineers Sdn. Bhd. v. Goh Hooi Yen* [1976] 2 MLJ 53; *Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin* [1976] 2 MLJ 177; *Karuppiah Chettiar v. Subramaniam* [1971] 1 MLJ 209 and *Sing Lian Express Sdn. Bhd. v. Soh Kim Tee.* [1974] 2 MLJ 24. (The emphasis is mine).

Now, the word I have underscored in that passage struck me as being entirely out of place in the context of the point being made and Encik Das conceded, quite properly, that the expression "tenant" was used rather loosely by the Supreme Court on that occasion. It is clear that the Apex Court was not called upon to deal with the point that has arisen so acutely for consideration in the present appeal.

Happily I am spared the task of expressing any opinion as to the correctness of the proposition appearing in the foregoing passage in *Jayaraman*. But if I had been called upon to do so, I would, with the greatest of respect, have been prepared to say that the opinion expressed by his Lordship in *Jayaraman* in wrong and that it does not accord with the statement of principle in *Temenggong Securities* (*supra*), in *Damodaran* (*supra*) and in *Wong Kuan Tan* (*supra*).

I now turn to deal with the decision of the Federal Court in *Intercontinental Mining* (*supra*) which the learned Judge in this case held to have settled the issue of caveatability squarely in the respondents' favour. The facts of that case were the following.

The respondents were the lessees of certain mining land and with them the appellants entered into an agreement entitled 'Permit To Mine' by the terms of which the appellants were permitted to enter upon and work the land for a period of three years. The agreement contained a clause for renewal upon the appellants giving due notice. The mining operations produced heavy losses. So the parties agreed that a third party should work the land. A third party was found and an option for a sub-lease was given to it. Later, differences arose between the appellants and the respondents and the former entered a caveat to protect their interest under the permit to mine. The High Court ordered the removal of the caveat. The Federal Court allowed the appeal, reversed the High Court and directed the caveat to remain. The headnote to the report of the case in respect of what was held reads as follows:

> Held, allowing the appeal: the agreement between the parties in this case was in substance a sublease though not in the statutory form and equity would treat it as an agreement for a sublease and specifically enforce it. The appellants therefore had a right in equity to a registrable interest in the land, and therefore had a caveatable interest under s. 323(1)(a) and 323(1)(b) of the National Land Code.

What Gill FJ (as he then was) actually said on the point is to be found at pp. 147 to 148 and 149 of the report. He is there reported as having said the following:

> **It is clear from what I have already said that the appellants cannot claim title to or any registrable interest in the mining land in question**. The question then is, do they not have a right under their contract with the respondents to such title or interest? The learned Judge has said that all the appellants had was a permit to mine. He then goes on to say that a permit to mine could not confer a registrable interest in land and that in his view a caveat could not have been lodged in assertion of the rights under the permit to mine. It is true that the agreement is headed 'permit to mine', but that does not matter. The question is: what is it in reality? It is an agreement which put the appellants into possession of the mining land for the purpose of carrying out mining operations for a period of three years with the right to an extension for a further period of three years.

The agreement certainly does not create a tenancy or lease but it must surely rank as a contractual licence. As Lord Denning MR said in *Binions v. Evans*, there are a number of cases in the books in which a similar right has been given. They show that a right to occupy gives to the occupier an equitable interest in the land so that the Courts of equity will not allow the landlord to turn the occupier out in breach of the contract. The Courts of equity would give the agreement a construction, which Lord Eldon LC called an 'equitable construction' and construe it as if it were an agreement to execute a deed granting the occupier under the contractual agreement a lease for the period of occupation reserved under the agreement. They would thus order the landlord specifically to perform the contract, so construed, by executing such a deed. This is what the Court of Appeal did in *Zimbler v. Abrahams*. Sterling LJ said in that case at p. 582:

> Having regard, however, to the decision of Lord Chelmsford in *Parker v. Taswell*, we have in this case document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance. If the true construction of the document is that it was not a demise which turned out to be inoperative, but an agreement for a lease, the case for specific performance is a *fortiori*.

In the words of Denning LJ in *Inwards v. Baker* "it is for the Court to say in what way the equity can be satisfied". In *Yong Tong Hong v. Siew Soon Wah & Ors.* this Court gave effect to the express intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. That decision of this Court was upheld by the Privy Council in *Siew Soon Wah & Ors. v. Yong Tong Hong* in which their Lordships held that in the circumstances of the case there arose in the respondent's favour an equity or equitable estoppel protecting his occupation, of the premises for a period of thirty years.

In *Chin Cheng Hong v. Hameed & Ors.*, a decision of the Court of Appeal, Buhagiar J said:

> This agreement is a non-statutory and non-registrable instrument; such instruments do not create an estate or interest, legal or equitable, in the land but create a contractual right, a personal right of action; it passes no actual interest in the land that can be called an equitable estate in ordinary sense, but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument (vide Hogg, Registration of Titles to Land, p. 116). As Lord Dunedin stated in *Haji Abdul Rahman v. Mohamed Hassan* ([1917] AC 209): 'The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.' This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it caveatable interest and to support a caveat (*In re Registration of Caveat* [1980] Innes, 114). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interest in land, but a caveat, being in the nature of statutory injunction, does not in itself make a claim or right either better or worse.
>
> Applying the principles enunciated in the above cases to the facts of the present case it would seem clear that **if** the agreement is in substance a sublease, though not in the required statutory form, equity will treat it as an agreement for a sublease and specifically enforce it, in which case the appellants have a right in equity to a registrable interest in the land, so that they are entitled to lodge a caveat under s. 323(1)(a) of the National Land Code. (emphasis added)

The next passage is at 149 and it reads as follows:

> From what I have just said it follows that if the agreement in the present case is taken as a permit or licence to the appellants to enter the land and mine it, and **in view of the fact that the appellants relying on that agreement entered into occupation of the land and**

> **spent large sums of money to commence mining operations, equity will protect their rights under the agreement and hold that the respondents are holding the land comprised in the mining lease in trust for the appellants to permit the appellants to mine it for the duration of the permit**. Thus, the appellants were also entitled to lodge a caveat under s. 323(1)(b) of the National Land Code. (emphasis supplied).

Now, these passages most certainly call for comment. At the outset it must be noted that the Federal Court made two important concessions: first, that the appellants in that case had **no claim** to any title or registrable interest in the mining land; second, that those appellants were neither tenants nor lessees. On the first of these premises alone, there was, in terms of s. 323(1)(a), no caveatable interest. The second concession has the effect of rendering anything said by the Federal Court wholly irrelevant to the facts of the present appeal.

Next, it is clear that in that case caveatability was sustained on two grounds. The first of these, the primary ground, is that Intercontinental was a contractual licensee. What appears, with respect, to have been overlooked by Gill FJ was that a contractual licence is not one of those interests that are caveatable under the Code.

It is therefore with utmost respect that I am obliged to state that the Federal Court proceeded upon an erroneous premise in equating a contractual licence with an interest in land capable of **statutory protection**. Intercontinental, as a contractual licensee, may well have had remedy *in personam* against its opponent in the case. (See *Khew Ah Bah v. Hong Ah Mye* [1971] 2 MLJ 86). But what it most certainly did not have, as a contractual licensee, was a caveatable interest in the mining land. It would appear that, at least on that occasion, Homer nodded.

The secondary or alternative ground on which Gill FJ found for Intercontinental, namely, that Societe was holding the mining lease in trust for the former does not appear to accord with any of the recognised species of trusts. It my judgment, the expenditure by Intercontinental in reliance upon the permit fell to be classified, not as a trust, but as an estoppel, creating at its highest, an expectation of limited proprietary rights. Lawyers term it proprietary estoppel. On the footing that the doctrine is to be treated as a separate category of estoppel, at least one Judge has called it an amalgam of doubtful utility and drawn attention to the criticism levelled against it. (See: Robert Goff J in *Amalgamated Investment & Property Co. Ltd v. Texas Commerce International Bank Ltd.* [1984] QB 84 at p. 103). The operation of the doctrine at its optimum was quite recently considered by the Privy Council in *Lim Teng Huan v. Ang Swee Chuan* [1992] 1 SCR 249, an appeal from Brunei Darussalam.

It is quite out of place for me to enter upon a full discussion of that doctrine since to reliance was placed by the respondents upon it. But I am compelled to deal with it only to demonstrate the error into which Gill FJ fell in equating the doctrine of proprietary estoppel with the concept of a trust. The doctrine when applied to the facts of *Intercontinental Mining*, at best, vested in the appellant in what case only a right *in personam* to secure its temporary occupation of the mining land in accordance with the terms of the permit. That right *in personam* was available to be enforced in the ordinary way by suit accompanied by an application in the action for the appropriate interlocutory specific relief. However, the nature and extent of the *in personam* claim did not, on the facts of *Intercontinental Mining*, also create a caveatable interest.

But I am not to be taken as saying that the doctrine of proprietary estoppel, or more appropriately, estoppel by encouragement, can never be utilised to support a caveatable interest. The consequences of that doctrine depend very much on the nature and extent of

the representation made or the encouragement offered. If, for example, the fact pattern that emerged in *Ang Swee Chuan* (*supra*) were to occur in this country, the representee may well be held to have made out a case to sustain a caveat.

There is one further observation that I would make about *Intercontinental Mining*. It is this. Having read the judgment in that case, I have formed the view that the headnote to the report is misleading and inaccurate. It appears to have been based upon the passage in the judgment that appears at p. 148 of the report. I have reproduced that passage earlier in this judgment, placing emphasis on the word "if" appearing in it. The proposition made by Gill FJ in that passage is not conclusive; it is merely suppository. What the headnote has done is to alter the effect of the proposition by stating it in absolute terms. That to my mind is wrong.

Lastly, it must be borne in mind that *Inter-Continental Mining* was decided before the pronouncements in *Temenggong Securities*, *Eng Mee Yong*, *Damodaran* and *Wong Kuan Tan*. I am, with respect, of the view that if the facts of that case were to recur to-day, the decision might well be different: for we now have the benefit of the jurisprudence that has since flowed. It must also be borne in mind that the respondents in the *Intercontinental* case did not mount an argument (as has been done by the instant appellant) on s. 213(3) of the Code.

In these circumstances, the learned Judge was plainly wrong in treating the present case as having been concluded by the decision in *Inter-Continental Mining* (*supra*). To say that is to ignore the obvious. Speaking for myself, I am entirely satisfied that the present appeal does not turn on anything that was decided by the Federal Court in *Inter-Continental Mining.*

Conclusion

For the reasons that I have given in this judgment, the respondents had no caveatable interest in the land at the material time. To repeat, all that they had was an exempted tenancy for two years with an option to have it renewed for a further two years. It is an interest that it only capable of protection by endorsement. No such endorsement was made. There is, therefore, absolutely no basis on which the caveat could be allowed to remain.

Accordingly, this Court directed that the caveat be removed forthwith and made an order in terms of the appellant's originating summons. The appellant was given its costs here and in the Court below. The deposit was ordered to be refunded to the appellant.

V.C. George JCA:

I have read the judgment herein, in draft, of my learned brother Gopal Sri Ram JCA with which, with one reservation that does not affect the conclusion that we reached in this appeal that it should be allowed, I am in full agreement.

The strongest position that Encik C.V. Das of Counsel for the respondents could take was his contention that on the exercise of the option, what was a tenancy exempt from registration (as defined by s. 213(1)(b) of the National Land Code read with s. 223 thereof) became a registrable interest as per the Code in that if one takes into account the extra 2 years, the 2 years tenancy metamorphosed as it were, into a 4 year lease.

Now, the notes of proceedings suggest that the learned Judge in the Court below followed *Inter-Continental Mining Co Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 to hold that by the exercise of the option the respondents acquired a contractual right to occupation of the premises for a further 2 years which gives them a right in equity

to specific performance and which in turn gives them an interest in the land that may be protected by a caveat. Dr. C.V. Das as an alternative submission, sought to support this view of the learned Judge.

As to the former of the submissions, it would seem that it was anticipated, as it were, by the legislature by it enacting s. 224(b) of the National Land Code!

> 224. In determining... whether any term for which land is granted exceeds any specified number of years...
>
> (b) If the term is for a fixed period, no account shall be taken of the fact that it is capable of renewal in pursuance to an option...

The relevant provision in the instant case in respect of the fixed term of the tenancy and of the option is in clause 2 of the tenancy agreement:

> 2. The premises shall be rented to the tenants for 2 years commencing 1 August 93 (rent fee) to 31 August 95 plus a further 2 years option.

I agree with Encik T. Thomas that the test prescribed by s. 224 is applied by looking at the section against the instrument creating the estate or interest, in the instant case the section against the tenancy agreement with particular reference to clause 2 thereof and upon such application you have the "term for a fixed period" of 2 years only, since "no account shall be taken of the fact that it is capable of renewal" for the further fixed term of 2 years. And clearly that further two years is to commence not at the time of the exercise of the option but after the initial fixed period of 2 years, provided that the option is duly exercised before the expiry of the initial 2 year period. Gopal Sri Ram JCA had referred in the course of the submissions, to the judgment of the High Court of Australia in *Gerraty v. Mc Gavin*, [1914] 18 CLR 152 which points out at p.163 that the law has always been that the due exercise of an option for renewal creates a fresh term commencing from the expiry of the earlier term. The passage that Justice Gopal Sri Ram had in mind bears reproduction:

> Now, what is the position of a lease obtained by the exercise of an option to renew? Clearly it is a new lease, a new demise. An option given for valuable consideration is merely an irrevocable offer, but beyond that there is no contract for a further term, unless and until the offer is duly accepted, by exercising the option. The matter is plain on principle; but there is authority, and I shall refer only to two cases. One is *Hand v. Hall* (1), decided by Lord Cairns LC, Cockburn LCJ, and Brett LJ. There it was held that a lease for twelve months containing a right of renewal for three and a half years or more need not be under seal. The Court so held because, said Lord Cairns, until the option is exercised no interest passed to the tenant. He added (2):- It is a stipulation that at his option, on a notice given to the plaintiff, he shall not be disturbed for three years and a half. Whereas there is not anything to be done by the tenant in the first part of the agreement to create a demise, in the second part something has to be done by him before the part takes effect, and until that is done it is impossible to tell whether a tenancy shall come into force or not. I think, therefore, that it is absolutely necessary to divide the contract into two parts.

I respectfully agree that the matter is plain on principle. Both on principle and on authority the 2 years metamorphosing into 4 years argument has no merit.

As to the reliance on *Inter-Continental*, I premise what I have to say by pointing out that Justice Gopal Sri Ram has painstakingly and incisively demonstrated beyond any doubt in respect of the first of the two conclusions arrived at, "that the Federal Court had proceeded upon an erroneous premise in equating a contractual licence with an interest in land capable of statutory protection."

Justice S.S. Gill who wrote the judgment of the Court had, after referring to various judgments including those of Denning MR, Sterling LJ, Lord Chelmsford and Lord Dunedin, referred to and applied the ratio in the passage in the judgment of Buhagiar J in *Chin Cheng Hong v. Hameed & Ors.* [1954] MLJ 169 at 170 *viz*:

> This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it caveatable interest and to support a caveat.

The contractual right in *Inter-Continental* was what was left of a 3 year permit to mine certain land. With the greatest respect, I have failed to find anything in the judgments relied on by Justice Gill that support the conclusion that the contractual right to mine land for what was left of the fixed period of 3 years of the permit to mine, gave the holder a right that could be protected by a caveat.

As to the learned Federal Judge (as he then was) holding that the option holder holds the land in trust for the permit holder and concluding that the option holder was entitled to lodge a caveat under s. 323(1)(b) of the Code (see page 149 of the report), it is relevant to look at s. 323(l)((a) and (b) of the Code:

> 323. **Application for entry of private caveat.**
>
> (1) The persons and bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest;

What was overlooked was that the subsection (1)(b) which does provide that a private caveat may be entered by "any person or body claiming to be beneficially entitled under any trust affecting any such land or interest" refers, not to any and all lands and interests but only to land and interest as defined in s. 323(1)(a) that is to say, land in respect of which there is a claim to title or any registrable interest. Which means that one is back at square one, posed with the question: have you a claim to title or to a registrable interest or to any right to such title or interest? The answer to which, in *Inter-Continental* if the question had been posed in the context in which it should have been posed, would I think, have been in the negative.

I would, with respect, at the least go along as far as Justice Gopal Sri Ram has, when he said that if *Inter-Continental* were heard today the decision might well be different from that arrived at 20 years earlier in 1974.

I had earlier, in expressing full accord and agreement with the judgment herein of Justice Sri Ram, mentioned a reservation. That is in respect of his holding that *King's Motor (Oxford) Ltd v. Lax* [1969] 3 ALL ER 665 was wrongly decided. In *Lax* it was held that an option in a lease for a further term "at such rental as may be agreed upon between the parties" was in the absence of an arbitration clause void for uncertainty. With respect I think that the point is arguable and not only because it was after all followed by our Supreme Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1987] 1 MLJ 236.

However *vis a vis* the issues in the instant case, nothing turns on the view I take of *Lax*. The contention that the option clause was bad for uncertainty here, was not founded on a contention similar to that in *Lax*, that is that a term of the tenancy as renewed, e.g. the quantum of rent, was uncertain, but that having the words "plus a further 2 years option"

appended to the provision in respect of the fixed term of the tenancy, makes for uncertainty. Encik T. Thomas for the appellants called to aid *Lewis v. Stephenson* [1898] 67 LJQB 296 where it was held that the words "with the option of renewal" were sufficiently definite to enable the Court, at the instance of the tenant to carry them out by a decree for specific performance for a renewed agreement for the same period on the same terms, except as to renewal as those contained in the agreement. I would apply to the facts of the instant case the conclusion arrived at by Bruce J at p. 300 of the report where he analysed the effect of those words:

> That it is only to give to language its natural meaning to hold that a renewal of a lease means the renewing of the old lease for the same period and on the same terms. Unless such a meaning is given to the word "renewal," the words in the present agreement are deprived of all legal significance, and I am reluctant to come to the conclusion that the words inserted in a legal document ought to be taken as having no effect. But then it is said that if the terms of the renewed lease are to be the same as the terms of the original lease, the renewed lease must contain a stipulation for renewal, and so on in perpetuity. But such a construction is, I think, manifestly unreasonable. "With option of renewal" does not mean with continued options of renewal after renewal. There is, I think sufficient authority to support the view that an express provision that all covenants in the original lease shall be inserted in the renewed lease will not include a covenant for a further renewal - see *Iggulden v. May* [1804] and *Hyde v. Skinner.*

In respect of the passage from the judgment of Wan Yahya bin Pawan Teh SCJ in *Jayaraman v. Kwong Yik Bank Bhd.* [1994] CLJ 695 relied on by Encik Das (and referred to in Justice Gopal Sri Ram's judgment):

> However in various recent cases the Courts have given the section, in particular, subsection (1)(a) a wider and liberal interpretation to include purchasers of land, company owners, chargees, tenants and even an option holder...,

It has to be remembered that the part of the section in question in the judgment was s. 323(l)(a). What Justice Wan Yahya was saying was in the context of the sub-section and was to the effect that virtually any person or body could invoke the sub-section but with the obvious implied proviso, (since it was being said in the context of the sub-section), "provided that the said purchaser of land, company owners, chargees, tenants and even option holders are claiming title to or any registrable interest in any alienated land or any right to such title or interest." That the learned Judge used words like "company owners" and "tenants" I think shows that he was not purporting to make any precise legalistic holding but was providing with a flourish, as it were, emphasis to the "wider and liberal interpretation" of the sub-section that he was talking about.

Hj. Abu Mansor bin Ali JCA:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram, JCA, in draft. I agree with his conclusion that the respondents are exempted tenants, for the protection of whom the National Land Code has provided a specific procedure by endorsement in the register document of title. Hence for the protection of their rights, caveats are not available to them. Be that as it may, I am also of the view that it does not mean that they have no remedy against Quill.

There is no basis why the respondents' caveat should be allowed to remain. I therefore concur with the order that the caveat be removed forthwith.